United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals
For the
District of Columbia Circuit

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED MAR 17 1958

Joseph W. Stewart
CLERK

No. 13,994

JOHN A. SAVAGE and ELIZA T. SAVAGE,
Appellants,

v.

IVAN K. HADLOCK, ET AL.,
Appellees.

No. 13,995

924

JOHN A. SAVAGE and ELIZA T. SAVAGE,
Appellants,

v.

IVAN K. HADLOCK, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM A. GALLAGHER
1804 M Street, N. W.
Washington, D. C.
Attorney for Appellants

Washington, D. C.
ROBERT L. THO[illegible]
Printer
EX 3-0625

STATEMENT OF QUESTIONS PRESENTED

The appellants, having noted their appeals, in the District Court, from an order entered on February 11, 1957, in the consolidated cases identified in the caption, and having made their deposits for costs in this court and filed a partial record on appeal, moved this court, inter alia, to permit them to prosecute said appeals in forma pauperis. In its order entered upon this motion the court decreed,

> ". . . the appeals, however, are limited to the following issues:
>
> (1) Validity of the District Court order of July 28, 1954, and the judgment based thereon, having regard to the action of this Court in dismissing the appeal taken therefrom;
>
> (2) Standing of the appellants to contest the validity of the above-mentioned order and judgment in this proceeding."

The foregoing two points, then, are necessarily the questions presented to the appellants for discussion in this brief.

The ex parte hearing of October 22, 1954, has been referred to in this brief, but being mindful of the limitation set out above, counsel has refrained from dealing with the nature of that hearing herein, and has not included in the appendix the parts of the record covering that phase of this cause; nor attempted to deal with other errors apparent upon the face of the record.

INDEX

	Page
Jurisdictional Statement	1
Statement of the Case	2
Statement of Points	8
Summary of Argument	9
Argument I	10
II - The Decree of October 29, 1954 is Void	14
III - The Action of this Court in Dismissing the Appeal in Case No. 111-51, No. 12, 559 in this Court	14
IV - The Standing of Appellants to Contest the Validity of the Orders of July 28, 1954, October 29, 1954, and February 12, 1957	19
Conclusion	23

TABLE OF CASES

Adams v. Postal Telegraph Cable Co., 155 U.S. 689, 698	11
American Sec. Co. v. Baldwin, 287 U.S. 156	18
Chase v. United States, 261 Fed. 833, decree affirmed, 256 U.S. 1	16, 17
Denny v. Bennett, 128 U.S. 488, 489	15, 18
Guth v. Texas, 155 Fed. 2, 563	16
Higgins v. California Prune and Apricot Growers, 3 Fed. 2d 896	16
Hill v. Wampler, 298 U.S. 463	15
Hill v. United States, 298 U.S. 460	18
Hovey v. Elliott, 167 U.S. 409	12, 13, 21
Lawrence Manufacturing Co. v. Janesville Mills Co., 138 U.S. 552, 561	20
Messinger v. Anderson, 225 U.S. 438	16
O'Brien v. Wheelock, 184 U.S. 450, 485	20
Reynolds Spring Co. v. L. A. Young Industries, 101 Fed. 2d 259	17

	Page
Taylor v. Morton, 67 U.S. 481	15
The Virginia, 60 U.S. 182, 19 How. 162	15
United States v. DePachacho, 20 How. 261	15
United States v. Gomez, 64 U.S. 326	15
Winsor v. McVeigh, 11 Wall. 259, 267	21

REFERENCES

American Jurisprudence	
Vol. 37, p. 516, Sec. 34	18
Vol. 31, p. 91, Sec. 430	21
Freeman, Judgments, Vol. 2, p. 1544, Sec. 731	20
Title 28, U. S. Code, Sec. 1291	2

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 13,994

JOHN A. SAVAGE and ELIZA T. SAVAGE,

Appellants,

v.

IVAN K. HADLOCK, ET AL.,

Appellees.

No. 13,995

JOHN A. SAVAGE and ELIZA T. SAVAGE,

Appellants,

v.

IVAN K. HADLOCK, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Appellees sued the appellant, John A. Savage, charging him with fraud, and prevailed: Thereafter they filed a second suit, based upon the decree in the earlier action, charging said John A. Savage and appellant Eliza T. Savage, with fraud, and the second suit was consolidated with the first suit. This appeal was taken from the decree

of the District Court, entered in the consolidated suit, in favor of the appellees.

This court has jurisdiction under Title 28, U. S. Code, Section 1291.

STATEMENT OF THE CASE

This case is here, as indicated in the caption, as a consolidation of two cases, one filed in the District Court in 1951, more than five years after the alleged cause of action arose (No. 111-51), and the second case (No. 254-54), was filed in 1954, and being based upon the decree in the earlier case, the two were consolidated by the District Court upon motion of appellees.

In the first case, John A. Savage, appellant, was charged with fraud of several varieties. (R. 55). He appeared and answered fully, appropriately contesting the charges and putting the cause at issue. A trial date was set and Savage subpoenaed a number of witnesses to testify in his behalf, together with numerous documents (R. 87-91). Upon the trial day both sides appeared for trial with their witnesses. The Court thereupon, of its own motion, and notwithstanding that fraud was crucial issue, entered an order (R. 93), sending the cause to the Court Auditor. This order was general in its terms; it did not define the issues, nor lay down any limitation upon the Auditor to guide him, but left him to determine what issues were raised by the pleadings, both of law and of fact, including the issue of fraud. Prior to any proceedings before him the Auditor estimated the expense of his hearing to be $875.00, and assessed one-half of this amount against the appellees (plaintiffs), and one-half against the defendant, appellant Savage. The Auditor then entered an order directing that said amounts be deposited with him in advance of hearing, as indemnity. Appellant Savage thereupon filed in the District Court a motion to require the appellees, who were non-residents, to post bond to indemnify him, as required

by law, against the loss of such deposit in the event that he should be successful in his defense (R. 94). This motion was denied (R. 98). Savage then filed a motion before the Auditor, moving that the Auditor vacate the order requiring him to make the deposit, which was also denied. His motion contested the legal authority of the Auditor to assess costs against a defendant. On June 29, 1954 the Auditor filed a preliminary report (R. 99, App. 1), in which he reported the failure of John A. Savage to post the said sum of $437. 50, as security for the Auditor's estimated charges. Upon this the appellees filed a motion with the District Court (R. 104, App. 2) asking for an order striking John A. Savage's answer and other pleadings from the record, and for a judgment against him by "default" in not posting said indemnity; and in the alternative prayed for an order vacating the order of reference to the auditor and setting the case for trial before the District Court upon the merits. Appellant Savage did not oppose the alternative prayer; but objected to the striking of his pleadings and the entry of a default judgment against him, asserting that he was not in default, having filed his answer; and further asserting that the Auditor had not authority in law to require him, as a defendant, to post said indemnity (R. 112). After hearing, the Court disposed of this motion by entering the order of July 28, 1954 (R. 114, App. 4), and that order is the one to which this Court has directed attention by its order of September 13, 1957, as follows:

> ". . . . the appeals, however, are limited to the following issues: (1) Validity of the District Court order of July 28, 1954, and the judgment based thereon, having regard to the action of this Court in dismissing the appeal taken therefrom. "

This July 28 order decrees that the order of the Auditor requiring the deposit of indemnity from the appellant Savage, "be, and it is hereby, confirmed. "

The order then proceeds:

> "It is further ordered that the Plaintiff's motion to strike defendant's answer and all pleadings filed in this cause by defendant, be and the same hereby is, granted; provided however, that if defendant, within five days from the date of this order shall deposit with the Auditor his share of the said indemnity in the amount of $437. 50, then and in that event, plaintiff's motion to strike the answer and all pleadings filed in this case by defendant, shall be denied. " (R. 114, App. 4)

This is the order upon which the appellees relied to establish a "default judgment". It is the order, they have consistently and emphatically insisted, which struck from the record all of Savage's pleadings, and authorized them to press for, and obtain, the ex parte hearing of October 22, 1954, and the final order of October 29, 1954. Nowhere in the record does it appear that there has ever been entered any order whatsoever striking appellant Savage's answer in that case. No contempt proceedings were ever instituted against him for the manner in which he proceeded to comply with the order of July 28, 1954. No default judgment was ever entered disposing of any of the issues in the case; nor was any judgment entered purporting to be a default judgment, or a decree pro confesso taking the complaint of the appellee as confessed.

The record does show that Savage, within the time allowed him by the above order, did deposit the sum required of him, which would have been full compliance with the order, except that he also filed at the same time a letter, a copy of which he delivered to the office of Judge Tamm, who had signed the above order. This letter was couched in most intemperate language, protesting the requirement that he make the deposit (R. 118). He also later apologized for his conduct, also by letter (R. 78, App. 18), and Judge Tamm apparently accepted the apology, for no action was ever taken against Savage for contempt of the Court.

After the deposit aforesaid was made, and on September 15, 1954, appellees filed a motion "for Further Proceedings to Carry into Effect the Plaintiffs' Judgment Against Defendant" (R. 116), identifying the said order of July 29, 1954 as the "plaintiffs' judgment".

This motion for further proceedings was not presented to Judge Tamm for decision, but was taken before Judge Holtzoff. It prayed that the case be set for ex parte hearing of appellees' evidence; and on October 12, 1954, over Savage's objection that there had been no default, an order was signed by Judge Holtzoff, setting the cause down "before a non-jury Court for the purpose of taking ex parte proof from the plaintiffs . . . ." (R. 122, App. 5).

It is quite evident from the record that all proceedings after July 29, 1954, were based upon the assumption that the order entered on that date declared a default on the part of Savage for his non-payment of $437.50 to the Auditor; struck his answer and other pleadings from the record, and then gave judgment against him. The case went forward as if Savage had never entered an appearance and had never filed any answer. On October 22, 1954, the ex parte hearing was held, and appellees' proof taken. Appellant Savage was denied the benefit of his answer and was denied the right to produce witnesses and evidence in proof of the allegations of his answer. Then, after appropriate motions had been filed by appellant Savage, pointing out the failure of the Court to afford him due process of law, and defects in appellees' proof, had been overruled (R. 134), on October 29, 1954, the District Court Judge before whom the ex parte hearing had proceeded signed an order depriving the appellant Savage of two pieces of real estate to which he held legal record title, and awarded judgment against him for damages in the amount of $17,548.91 (R. 153). That judgment recites:

> "This matter came on to be heard before the Court pursuant to the Order entered October 12, 1954, which set the cause down for the purpose of taking ex parte

> proof from the plaintiffs . . . . default judgment having been entered on July 28, 1954 . . . . "
> (R. 184, App. 16) (Emphasis added).

The dismissal of the appeal in Case No. 12, 559 was entered upon a preliminary proceeding, which came before the Court on the application of John A. Savage for leave to prosecute the appeal in forma pauperis. The records of this Court show that he first filed in this Court an application for an extension of time for filing the record. To this the appellees filed a motion to dismiss. This motion the Court ordered held in abeyance for thirty days. Appellant thereafter filed a petition for leave to proceed in forma pauperis. On March 12, 1955, the Court granted appellants' motion to dismiss, and dismissed the appeal. In the same order the Court said:

> "It is further ordered that Appellant's motion for a further extension of time to file the record be, and it is hereby denied, and that appellant's petition for leave to prosecute his appeal in forma pauperis be, and it is hereby, dismissed as moot. "

On April 25, 1955, the Mandate of this Court was filed in the District Court, in Civil Action No. 111-51 (R. 186).

On January 20, 1956, appellees filed the second suit, No. 254-56, in District Court, naming appellant John A. Savage as one defendant, and his sister, Eliza T. Savage, co-appellant herein, as a new party defendant (R. 240). This suit sought an enlargement of the final order of October 29, 1954, heretofore referred to (R. 148), in respect i. e. an increase in the money award made therein; an extension of the order to make it effective as to three pieces of real estate held by John A. and Eliza T. Savage as joint tenants; and to set aside deeds from Savage to his sister, executed long before but recorded only shortly before the entry of the October 29, 1954 order. These properties were not involved in any way in case No. 111-51, and were not described therein, but were sought to be made subject to the final decree in that earlier case.

On March 1, 1956, the appellants filed their several answers putting in issue the allegations of the complaint in case 254-56, and on December 14, on motion of the appellees, a consent order was entered, consolidating No. 111-51 with No. 254-56 (R. 234).

On January 16, 1957, appellants filed with leave of Court their amended answers, contesting, inter alia, the validity of the October 29, 1954 order entered in the earlier cause, on the ground that it had been entered as a result of the denial of due process of law, specifying that the appellant in that case had been denied the benefit of his answer, and had been denied a trial of the issues raised by said answer, and that the final order aforesaid was therefore void. (R. 251, 261). The pretrial hearing was held on January 17, 1957, and on January 23, 1957, the case was tried before Judge Rizley, assigned to the District Court from the District of Oklahoma. The question of due process was again raised in this trial, and the entire file in case No. 111-51 was admitted in evidence, so much of it as was considered material being offered by counsel. The transcript of the ex parte hearing was offered by counsel for appellants, and was admitted by the court upon the question of the validity of the order of October 29, 1954 aforesaid.

On February 11, 1957, the trial court's Findings of Fact, Conclusions of Law, and Decree, embodied in a single document, were filed, finding on all issues for the appellees (R. 270). On February 21, 1957 the appellants' appropriate motions were filed, preserving their rights on appeal (R. 277), and on March 29, 1957 were overruled. Appellants filed a timely application for leave to prosecute their appeal in forma pauperis, which was denied. They noted their appeals in the District Court in each case, as required, and filed in this Court a partial record on appeal in each case; and a motion to consolidate the two cases, and for leave to proceed in forma pauperis, which motion was granted by Order dated September 13, 1957, to the extent that they were allowed to proceed without prepayment of costs and the appeals were

consolidated. Their appeal however, was limited to these issues:

> "(1) The validity of the District Court order of July 28, 1954, and the judgment based thereon, having regard to the action of this Court in dismissing the appeal taken in Civil Action 111-51 from such orders; and
>
> (2) The standing of the appellants to contest the validity of the above-mentioned order and judgment in this proceeding. "

These issues will be taken up in the order in which they are stated in the said order. As stated by the Court; they are the questions presented.

STATEMENT OF POINTS

1. The order of July 28, 1954, was an interim order, not a final order striking appellant John A. Savage's answer and other pleadings; it is not a "default judgment", nor a decree pro confesso; and it does not purport to be any of these. It is an order giving the appellant Savage five days within which to pay a sum of money to the Court Auditor, within which time Savage delivered the payment, under circumstances which could have made him punishable for contempt of court; but no contempt proceedings were instituted. The order could not validly be construed as a default judgment, a decree pro confesso, nor as striking the answer and other pleadings. To so construe it would be to make it void, and it is against the policy of the law to so construe it. Also, such an order would have been premature. But the Court below construed it to be a "default judgment", as well as an order striking appellant's answer. The action of that Court giving such effect to the order was beyond the jurisdiction of the Court, and constituted a denial of due process of law.

2. The decree of October 29, 1954, based upon the void proceedings in the lower Court in so construing and giving such effect to the

order of July 28, 1954, was likewise void, being founded on denial of due process.

3. The action of this Court in dismissing the former appeal did not and could not establish or create any validity in the void order of July 28, 1954, or the void decree of October 29, 1954. The order of this Court was not made on the merits, but on collateral matter relating to procedure within the discretion of the Court. The Court neither affirmed nor reversed the lower Court in the appeal, and did not attempt to. The dismissal therefore was not effective to establish res judicata, nor the "law of the case." Even if the Court had affirmed the judgment of October 29, 1954, its action would not have made that order any less void, or give it any legal or binding force.

4. Since the appellees, by filing the second suit, No. 254-56, seeking the aid of a court of equity to enlarge, extend, and enforce the Decree of October 29, 1954, they themselves reopened that decree and cannot complain if by doing so their decree is held, as it should be, void and inoperative by any tribunal before which it is called into question. The appellants, being the ones whose property was taken from them by the decrees of the District Court in Action 111-51; and by the decree of February 11, 1957, in Action No. 254-56, occupy a status from which they can successfully assert the said decrees to be void and contest them in any court in which they are proffered as lawful and valid orders and decrees.

SUMMARY OF ARGUMENT

Appellants' summary of argument is identical with the statement of points, supra.

ARGUMENT

I.

The Court has put its hand upon the first fundamental flaw in the appellees' case. Appellees have without reservation based their whole position upon the validity of the July 28, 1954, decree as an order giving them a "default judgment", striking appellant Savage's answer and other pleadings from the record, and entitling them to proceed ex parte to prove their case without hindrance from said appellant, and denying him the right to produce witnesses and evidence to prove the defense set out in his answer. But the order does nothing of the kind, and it does not purport to. There are no words in the decree which can be construed to effect any of the claimed results. The proceeding was an equity proceeding. A "default judgment" is unknown in equity. Such a judgment is a creature of the law courts. In equity the proceeding is for a decree pro confesso, and the order pro confesso is obtained only after an order in the nature of a rule to show cause is issued against the recalcitrant litigant, giving him the alternative of carrying out the order of the court within a specified time, or else appearing in court on a day certain and showing cause why he should not obey. The order under consideration is an order akin to a rule to show cause; it does not decree that the appellant is in default and that the bill shall be taken as confessed against him; but gives him five days within which to comply with the order, in which event the motion for "default judgment" is to be denied. He paid the money within the time set, and to that extent complied with the order. (R. 116)

But it will be argued that Savage did not properly comply with the order of July 28, 1954; that although he made the deposit of $437.50 within the time allowed, he also filed the letter mentioned on page four of this brief, but was never called to account for any contempt. Perhaps it will also be argued that his punishment for this contempt was

striking of his pleadings; but there is not any order to that effect, and as will be seen below, the District Court has no jurisdiction whatever to strike a defendant's answer from the record for contempt, if the answer itself is a sufficient answer to the complaint, as was the appellant's here.

And if the order of July 28, 1954, had been an order in terms striking the appellant's answer in this case; entering a decree pro confesso in proper form, and depriving him, as a result, of the benefit of his pleadings, and of his right to make his defense by producing witnesses and taking their testimony in the trial; and of his right to introduce whatever evidence he might have tending to establish the defense pleaded, — that decree would have been on its face void, under the requirements of due process. Not merely reversible error, but void ab initio.

Appellees cannot escape this conclusion by now saying that the order of July 29, 1954, was valid because it did not strike pleadings, grant default judgment, was not a decree pro confesso - they have too long asserted the opposite. They have in all pleadings and arguments claimed the benefit of the order as a default judgment, etc., and have been assiduous in presenting it to the court in that light. They are now estopped to deny it. The District Court, after the entry of the July 28 order completely disregarded Savage's insistence that he was not in default, and gave to that order precisely the same effect it would have had, had it been, as a matter of fact and law, a decree pro confesso; and had stricken defendant's pleadings, and had entered a "default judgment" against him; and on the strength of that the Court proceeded with its ex parte hearing. In this state of the record the law is clear; and, as said in Adams v. Postal Telegraph Cable Co., 155 U.S. 689, 698: "The substance, and not the shadow", determines whether appellant was denied due process of law.

In Hovey v. Elliott, 167 U.S. 409, the Supreme Court said:

> ". . . a judgment by default entered after striking the answer of the defendant from the files as punishment for his contempt in refusing to obey an order of the Court is void for want of due process of law."

In the case quoted above, the Supreme Court held that there is no law whatever giving the District Court for this District the power to strike a defendant's answer from the files, and to proceed to enter judgment against him as though he had never appeared and answered. At page 417 the Court said also:

> "Can it be denied that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn a citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has the authority to render lawful that which, if done under legislative sanction would be violative of the Constitution?"

And in the same opinion the Court said:

> "The necessary effect of the judgment of the Supreme Court of the District of Columbia was to decree that" (the property of the defendant) "belonged to the complainants. If the Court had the power to do this by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without due process of law? * * *
>
> "The right here denied, by rejecting the answer and taking the bill for confessed because of the contempt, involved an essential element of due process of law . . . "
>
> "It being therefore clear that the Supreme Court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, . . . the only

> question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may therefore be collaterally attacked." (It is respectfully submitted that the court's words describe the case now under consideration.) (Underlining added.)

The Supreme Court held that such a judgment is void, and then stated:

> "We rest our decision on the want of power in the Courts of the District of Columbia to suppress an answer of parties defendant, and after doing so to render a decree pro confesso as in case of default for want of an answer . . ." (Emphasis added) P. 446-7.

The foregoing language is an accurate description of the procedure followed in this case; in which the District Court, without rendering a decree pro confesso, or striking defendant's answer, merely "suppressed" appellant's answer, dubbed the order of July 28, 1954 a "default judgment", and "carried it into effect" by holding an ex parte hearing, upon the basis of which it entered its Order of October 29, 1954, labelling that order "an order carrying into effect final judgment of July 28, 1954."

The salutary rule of law so emphatically stated in Hovey v. Elliott, supra, has never been modified, relaxed, neither insofar as the courts of the District of Columbia are concerned, nor as to any other jurisdiction. Indeed, it is believed that in this case alone has the District Court repeated the error condemned in Hovey v. Elliott.

II.

THE DECREE OF OCTOBER 29, 1954, IS VOID.

Since all proceedings founded on a void judgment are themselves regarded as invalid, the decree of October 29, 1954 being not only founded on, but emphasizing and repeating, the process by which appellant was deprived of due process of law, is also void. Nothing occurred, during the course of case No. 111-51 through the lower court, to remove the taint, nor was any attempt made to do so. This order was the instrument by which appellant Savage was deprived of his property, and brought to the condition of poverty which now hampers him in conducting this appeal.

III.

THE ACTION OF THIS COURT IN DISMISSING THE APPEAL IN CASE NO. 111-51, NO. 12, 559 IN THIS COURT.

The dismissal of the appeal in Case No. 12, 559 was entered upon a preliminary proceeding, which came before the Court on the application of John A. Savage for leave to prosecute the appeal in forma pauperis. The records of this Court show that he first filed in this Court an application for an extension of time for filing the record. To this the appellees filed a motion to dismiss. This motion the Court ordered held in abeyance for thirty days. Appellant thereafter filed a petition for leave to proceed in forma pauperis. On March 12, 1955, the Court granted appellants' motion to dismiss, and dismissed the appeal. In the same order the Court said:

> "It is further ordered that Appellant's motion for a further extension of time to file the record be, and it is hereby denied, and that Appellant's petition for leave to prosecute his appeal in forma pauperis be, and it is hereby, dismissed as moot."

It is quite apparent that this Court did not, at the time the order was entered, have before it the record in the case, and that the appeal was not under consideration upon the merits. With a case on the merits before the Court, the Court must affirm or reverse the lower Court. Taylor v. Morton, 67 U. S. 481. The dismissal of the appeal cannot be regarded as an affirmance.

It has been decided that the dismissal for failure to prosecute is not a final decision. Taylor v. Morton, 67 U. S. 481; The Virginia, 60 U. S. 182, 19 How. 162. That allowance of a motion to docket and dismiss a cause on account of the failure of appellant to file the record within the time required is not an affirmance of the judgment below, but merely remits the case to be proceeded with as the court below shall think proper. United States v. Gomez, 64 U. S. 326; United States v. DePachacho, 20 How. 261. A decision upon a motion or summary application is not to be regarded in the light of res judicata, or as so far, conclusive upon the parties as to prevent their drawing the same matters into question again in a more regular form of action. Denny v. Bennett, 128 U. S. 488, 489; Hill v. Wampler, 298 U. S. 463. The latter case holds:

> "Finality within the doctrine of res judicata does not attach to every ruling upon law made by a judge upon the decision of a motion. Denny v. Bennett, 128 U. S. 488, 489; Riggs v. Pursell, 74 N. Y. 370, 378; American Surety Co. v. Baldwin, 287 U. S. 156, 166. This is true though the ruling may have been pertinent or even necessary to the conclusion reached. In such cases finality will rarely be extended beyond the terms of the order, and applied to the supporting circumstances."

It is clear from the foregoing that the action of this Court in dismissing the appeal was not an affirmance, nor would it establish res judicata so that the appellant would be defeated by that ruling on another appeal.

It also is clear that no "law of the case" was made by that dismissal. In Guth v. Texas, 155 Fed. 2, 563, the Court said:

> "It may be urged by the defendant that we had once construed paragraph 5 of the amended complaint when it was before us on the first appeal as one for waste, and as such the plaintiff would have to allege that the defendant had burned and wasted the gas, gasoline, and petroleum distillates. So we did. . . . . We are not bound by our ruling on the pleadings on the first appeal, and may, indeed we must, under the extremely liberal rules of Federal Rules of Civil Procedure take any possible view of the facts which would entitle the plaintiff to relief. . . . Such view by us does not violate the 'law of the case' rule, which rule is, of course, not absolute. Messinger v. Anderson, 225 U. S. 438; Reynolds Spring Company v. L. A. Young Industries, 101 Fed. 2d 257, 259."

In Messinger v. Anderson, supra, the Supreme Court said:

> "In the absence of statute, the phrase, law of the case as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely express the practice of courts generally, to refuse to reopen what had been decided, not to limit their power. King v. West Virginia, 216 U. S. 92, 100; Remington v. Central, etc. R. R. Co., 198 U. S. 95, 99, 100; Great Western Tel. Co. v. Burnham, 162 U. S. 339."

An appellate court, by its decision does not preclude itself from doing justice between the parties, if on a subsequent appeal it should be convinced that its former decision was erroneous. Chase v. United States, 261 Fed. 833, decree affirmed, 256 U. S. 1.

The rule of the "law of the case" does not rigidly bind a court to its former decisions, but is only addressed to its good sense, and an appellate court may change its ruling, made in a prior appeal in the same case, to conform to a subsequent decision of the Supreme Court. Higgins v. California Prune and Apricot Growers, 3 Fed. 2d 896.

In Reynolds Spring Co. v. L. A. Young Industries, 101 Fed. 2d at page 259, the Court says:

> "It is a well-recognized rule that an appellate court on a second appeal may review and revise a conclusion reached on the first appeal, it becoming the law of the case only as to the lower court. Messinger v. Anderson, 225 U.S. 436, 444; Lawrence-Williams Co. v. Societe Enfants, etc., 52 Fed. 2d 853; United States v. Stevens, 64 Fed. 2d 853; Des Moines Term. Co. v. Des Moines Union Ry. Co., 52 Fed. 2d 616."

It seems well-established then, that even where an appellate court has fully heard a case on the merits, and explicitly decided those issues, the court may yet, if the case should come before it on a second appeal, reverse itself and do justice between the parties. Chase v. United States, 261 Fed. 833, decree affirmed, 256 U.S. 1.

To say that this Court, by dismissing the first appeal in this litigation, under the circumstances then prevailing, had in legal effect affirmed the July 28, 1954, the October 29, 1954, decrees, (for if either doctrine, res judicata or the law of the case, compel the appellants to submit to those decrees, the effect insofar as they are concerned will be the same as an affirmance), would mean that the Court by its refusal to permit the appeal to continue accomplished the same result as an affirmance would accomplish.

Appellants urge upon the Court, that the statement of law set out below is a true guide for this court's action:

> "In applying the doctrine of res judicata to orders, there is a distinction to be noticed between those made upon motions respecting collateral questions arising in the course of a trial and final orders affecting the substantial rights from which an appeal lies . . . . It is generally held that the doctrine does not apply to a decision on motion with the same strictness as to a judgment, and accordingly that on order made in a pending action on a motion involving

> merely a question of practice, or appealing to the discretion of the court is not an adjudication barring a subsequent or application on the same ground." American Jurisprudence, Vol. 37, page 516, Sec. 34; citing Hill v. U. S., 298 U. S. 460; American Sec. Co. v. Baldwin, 287 U. S. 156; Denny v. Bennett, 128 U. S. 488, 489.
>
> "The general rule is that a judgment which is void cannot be cured by subsequent proceedings. Such a judgment cannot be validated by citing the parties against whom it was rendered to show cause why it should not be declared valid; or by affirmance of an appellate court, especially if such affirmance is put upon grounds not touching the validity of the judgment. It is also worthy to note that even the legislature may not ratify a void judgment so as to import validity to it." (Emphasis added.)

And this being the law, even an affirmance by this Court would not make the orders here discussed anything but void.

On this point, therefore, it is respectfully submitted that the action of this Court in dismissing the appeal as aforesaid imparted no validity to the proceedings in the District Court, and that the doctrines of res judicata and the law of the case do not bind this court nor the appellants.

IV.

THE STANDING OF APPELLANTS TO CONTEST THE VALIDITY OF THE ORDERS OF JULY 28, 1954, OCTOBER 29, 1954, AND FEBRUARY 12, 1957.

It needs no argument, for it is spread on the record, that the appellants are the persons who have suffered and will suffer because of the entry of the above three orders, and it is their property which has been taken from them by those orders. They were the defendants in the two actions in which those orders were handed down, and are appellants here on that account. The manner of their coming here on the second appeal was as follows:

After the appellees had obtained the dismissal of the first appeal they returned to the District Court and filed a new suit. John A. Savage was the sole defendant in the first case. He was named as one of the defendants in the second suit, and his sister, Eliza T. Savage was named as co-defendant. That case was numbered C.A. No. 254-56, and is No. 13,995 in this Court, having been by order of this Court consolidated with No. 13,994 for the purpose of this appeal.

That second suit was filed on January 20, 1956, and it was in the nature of a supplementary bill of complaint in equity brought for the stated purpose of enlarging, extending, and enforcing the Decree of October 29, 1954 — enlarging it by increasing the amount of the money awarded, and extending it to embrace three new pieces of property owned by the two defendants jointly, and bringing in Eliza T. Savage as co-defendant, and to make her and her property subject to the terms of the aforesaid decree in the earlier case. The appellant Savage and his sister filed their answers March 1, 1956, and on application of the appellees the second suit was consolidated with the earlier one, for hearing. On January 16, 1957, with leave of Court, the appellees filed their amended answers . The clear object of the suit was to take away from appellees, and sell, the real estate they jointly owned, and to use the proceeds of its sale to satisfy the money award decreed by the order of October 29, 1954 as enlarged by the February 12 decree. The answers of the appellants set up the defense, among others, that the Decree of October 29, 1954 was a void decree, and that it was obtained by depriving the appellant John A. Savage of due process of law (R. 251, 261).

The record thus discloses that the appellees had returned to the court of equity to obtain its aid in executing the former void decree. Under these circumstances the law is settled as to the effect of such procedure, -

"When a party returns to a Court of Chancery to obtain its aid in executing a former decree it is at the risk of opening such decree as respects the relief to be granted on the new bill . . . . Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being in effect . . . . a bill to carry the former decree into execution, the Circuit Court was not obliged to do so if it believed that decree to be erroneous; and that it was erroneous we have already decided. Inasmuch as the plaintiff came into the court of equity to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Mitford, Pleading, 96. Indeed, it would have seemed to have devolved upon it, (the plaintiff corporation), to show that the decree was a right decree. Such is the language of Lord Redesdale in Hamilton v. Houghton, 2 Bligh 169, 193, and of Lord Chancellor Sugden in O'Connell v. McNamara, Dr. & War. 411-412. See also Lawrence v. Berney, 2 Rep. in Chancery 134; Adams Equity, 416; 2 Dan. Ch. Pr. (4th Ed.) 1866. The rule was much considered and applied in Wadhams v. Gay, 73 Ill. 415, and approved in this Court in Gay v. Parpart, 106 U.S. 679." Lawrence Manufacturing Co. v. Janesville Mills Co., 138 U.S. 552, 561.

"The bill purports to be an original bill in the nature of a supplemental bill, - supplemental to the bill originally filed, - whether by way of enforcing the decretal order entered on that bill, treated as a final decree, or, treating that order as interlocutory merely, of obtaining a decree on the whole case against new parties. Which view is taken is perhaps not material, for 'where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill.' Lawrence Manufacturing Co. v. Janesville Mills. And, moreover, the bill is an original bill as to the lands owners." (As in the present case the new bill is an original complaint against Eliza T. Savage.) O'Brien v. Wheelock, 184 U.S. 450, 485. See also, Freeman, Judgments, Vol. 2, page 1544, Sec. 731, citing authorities.

The filing of the second complaint had the effect of opening up the first cause, and the decrees entered in the first action, and presented to the District Court an opportunity to re-examine them, and to redress the wrong. The cases were consolidated, and the entire record in the first suit was before the court. The appellants urged that the final decree was void, but court, there can be no question that Eliza T. Savage, as to whom the proceeding was an original suit, was entitled to make this defense; and we believe that John A. Savage, under the authorities referred to above, was equally entitled, since the decrees were void. The lower court at the trial received evidence going to show, from the record in the first case, that due process had been denied, and ruled that it had not, and so stated in the Decree of February 12, 1957.

It is submitted that the latter decree, being but another step built upon the void orders of September 28, 1954, and October 29, 1954, is equally void, and "has no legal or binding force, or efficacy for any purpose or at any place. It cannot affect, impair, or create rights." Am. Jur. supra, Vol. 31, Sec. 430, p. 91.

From such orders and decrees the appellants claim the unqualified right to defend themselves, unless they have in some manner estopped themselves, and there is no evidence or allegation before this Court of any action on their parts which could be construed as estoppel, nor was there before the court below.

And in any and all events, Eliza T. Savage had the right to contest the validity of the September 28, and October 29, 1954 orders, and the right to appeal from them to this court, since she was not a party to them, nor to the appeal taken from them and dismissed by this Court.

And appellants believe that, as to John A. Savage also, the law as stated and approved Hovey v. Elliott, 167 U.S. 409, and in Winsor v. McVeigh, 11 Wall. 259, 267, and quoted below, must prevail to

establish firmly his standing to contest the validity of these orders and decrees in this or any other court. And, as he had standing to contest their validity in the District Court, having been defeated in the contest, does he not have an equal right to contest them here, affirmatively, by asking this court to reverse the void actions of the lower court? If not, where and how has he lost it? Not by estoppel, and not by the application of the law of the case, nor by the doctrine of res judicata.

> "Wherever one is assailed, in his person, or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his right, and is not entitled to respect in any other tribunal." (Emphasis added.)

CONCLUSION

The appellant, John A. Savage, having been sued in the District Court, and charged with fraud, having answered fully, and the cause being at issue upon complaint and answer, was deprived of due process of law by the action of the District Court which unlawfully treated his answer and other pleadings as though he was in default and as though said answer and other pleadings had been lawfully stricken from the record; conducted an ex parte hearing taking only the evidence of the plaintiff, as though a default judgment had been entered against him; and, upon such alleged "default judgment" and such ex parte hearing, the District Court entered a decree depriving said appellant of his property, without due process of law.

Upon appeal from the decree aforesaid, the appeal was dismissed upon a motion filed by appellees, addressed to the discretion of the court. The issues involved in that appeal were not before the court, there being

no transcript of record from the District Court filed in the cause, and the order of dismissal did not and did not purport to settle and determine any of the issues in the case. The dismissal, therefore, did not establish res judicata insofar as this Court is concerned, nor did it establish as the law of the case that the decrees and orders of the District Court were right and valid; and in any event this Court is not bound by such order but may decide the cause as equity and justice require.

The appellees thereafter filed in the District Court another suit for the purpose of enforcing, extending, and enlarging the former decree; naming John A. Savage, appellant, as one defendant, and Eliza T. Savage as the other. The answers of the defendants, duly filed, denied liability upon the ground that the decree sued upon was void for denial of due process. After hearing, the District Court entered its decree against the appellants, the effect of which is to enforce the October 29, 1954 decree and so deprive said appellants of three pieces of real estate held jointly. Said real estate was not involved in the first suit in any way, nor was Eliza T. Savage. The decree also enlarged the money award made in the earlier decree, and held affirmatively that the earlier decree was valid in all respects.

Appellants urge here that the decrees entered in the District Court on July 28, 1954, October 29, 1954, and February 11, 1957, in these consolidated causes, on the face of the record deprive the appellants of their property without due process of law, and are therefore null and void, and should be reversed.

Respectfully submitted,

WILLIAM A. GALLAGHER
1804 M Street, N.W.
Washington, D. C.
Attorney for Appellants

INDEX

	Record Page	Appendix Page
PRELIMINARY REPORT OF THE AUDITOR	99	1
Motion to strike defendant's answer and all pleadings filed in this cause by defendant, and for judgment against defendant; and, in the alternative, for an order vacating the order of reference entered herein on February 9, 1954	104	2
Affidavit of Margaret H. Earley in opposition to defendant's objections to preliminary report of auditor filed June 29, 1954, and in support of plaintiffs' Motion to Strike Defendant's Answer and all pleadings filed in this cause by defendant, and for judgment against defendant; and, in in the alternative, for an order vacating the order of reference entered herein on February 9, 1954	110	4
Defendants' answer to plaintiffs' P. & A. in support of Motion to strike pleadings, etc.	112	4b
Order confirming auditor's preliminary report, and granting defendants 5 days to deposit $437.50 with auditor	114	4c
Motion for further proceedings to carry into effect plaintiffs' judgment against defendant	116	4d
Exhibit A to Plaintiffs' motion for further proceedings - Letter from John A. Savage to Fred J. Eden, dated August 3, 1954	118	4f
Exhibit B in support of Plaintiffs' Motion for further proceedings, etc. - Letter from Auditor Fred J. Eden to John A. Savage dated August 4, 1954	119	4g
Order granting plaintiffs' Motion (September 15, 1954) for further proceedings, and setting ex parte hearing	122	5
Defendant's objections to proposed order of judgment for plaintiffs	134	5
Order carrying into effect final judgment of July 28, 1954	148	16
Order denying motion for new trial	176	22
Order denying motion for leave to withdraw letter of August 3, 1954 to Judge Tamm and Auditor Eden	177	22
Defendants' Letter to Judge Tamm, dated December 8, 1954	178	23
Order Denying defendants' motion to vacate order of October 12, 1954, setting cause for ex parte hearing; Holtzoff, J.	179	24
Order that attached writ of assistance issue to U. S. Marshal	180	24
Writ of Assistance	181	25
Return	182	26
Order that attached writ of assistance issue to U.S. Marshal	183	27

INDEX (Cont'd.)

	Record Page	Appendix Page
Order Filed April 29, 1955	184	27
U.S. Marshal's return of service	185	28
Motion to vacate proceedings and dismiss complaint	190	29
Order on Mandate	192	31
Application for stay of execution and/or other relief	193	32
Order denying motion to vacate proceedings and dismiss complaint and application for stay of execution	195	33
Appearance of William A. Gallagher as attorney for John A. Savage, defendant	196	33
Complaint to set aside fraudulent deeds	240	34
Motion to Strike and vacate Judgment	197	38
Order overruling motion to vacate and strike	207	48
Motion to enforce equity decree	209	48
Order to substitute party plaintiff	214	50
Motion to increase amount of moneys due plaintiffs from defendant John A. Savage in satisfaction of equity decree of October 29, 1954	215	51
Motion of plaintiffs to vacate certain conveyances of real property made by defendant to defraud plaintiffs, and to subject said real property to the satisfaction of the decree in equity for the payment of money	218	52
Consent Order	234	56
Findings of fact, conclusions of law, and decree	270	56
Order Filed March 29, 1957	284	63

Joint
~~APPELLANT'S~~ APPENDIX

---

99 [Filed June 29, 1954]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

IVAN K. HADLOCK, CARMITA L. HELMBOLD, Plaintiffs, vs. JOHN A. SAVAGE, individually and as administrator of the Estate of Myrtle DeMontis, Defendant.	Civil Action No. 111-51

PRELIMINARY REPORT OF THE AUDITOR

To the United States District Court for the District of Columbia:

The undersigned Auditor, Fred J. Eden, for report in the above-entitled proceeding, respectfully states as follows:

1. The said proceeding is before the Auditor pursuant to an order of Court entered February 9, 1954, reading as follows:

"Upon consideration of the issues herein, and it appearing to the Court that the issues herein are complicated and require reference to the Auditor of the Court, it is, by the Court, this 9th day of February, 1954,

"ORDERED, that the above-entitled cause be and it is hereby referred to the Auditor of this Court for consideration and report, pursuant to the Rules of Court, on the issues raised by the pleadings herein."

2. A First Meeting (pursuant to FRCP 53) was held on March 5, 1954, at which time the execution of the order of reference was considered and discussed. Counsel estimated that the hearing time would consume at least five days. Under Rule 15 (Local Civil Rules) the Auditor fixed the indemnity to be deposited in the amount of $875.00, one-half to be deposited by the plaintiff and one-half to be deposited by the defen-

100 dant. Auditor's Order requiring the deposit of indemnity issued March 5, 1954, and the plaintiff's share of the indemnity, $437.50, was promptly deposited on March 11, 1954. The defendant, however, filed

with the Auditor on March 18, 1954, a motion to reconsider and vacate the Auditor's order of March 5, 1954, requiring the posting of indemnity. Hearing on the said motion was had on April 9, 1954, and the motion denied by the Auditor, and the defendant given until May 15, 1954, to make deposit of indemnity in the sum of $437.50.

3. To the date of this Report (June 28, 1954) the defendant has failed to make the deposit required of him to be made.

4. At the request of counsel for plaintiff, the defendant's refusal to make the deposit is certified to the Court for such action as may be deemed appropriate in the premises.

5. For the information of the Court, it may be stated that of the total indemnity required to be deposited, namely, $875.00, the sum of $625.00 is allocable to Reporter's charges for transcript of testimony covering five hearing days.

6. Copies of this preliminary report and notices of its filing have been sent to the following:

J. H. Connaughton, Esq.,
717 District National Building,
Washington 5, D. C.

Nicholas J. Chase, Esq.,
Wyatt Building,
Washington 6, D. C.

John J. Donnelly, Esq.,
1001 Connecticut Ave., N. W.
Washington 6, D. C.

Respectfully submitted,

/s/ Fred J. Eden
Auditor.

---

104 [Filed July 16, 1954]

MOTION TO STRIKE DEFENDANT'S ANSWER AND ALL PLEADINGS FILED IN THIS CAUSE BY DEFENDANT, AND FOR JUDGMENT AGAINST DEFENDANT; AND, IN THE ALTERNATIVE, FOR AN ORDER VACATING THE ORDER OF REFERENCE ENTERED HEREIN ON FEBRUARY 9, 1954

Plaintiffs respectfully move the Court for an order striking Defendant's answer and all pleadings filed in this cause by Defendant, and for judgment against Defendant, and in the alternative for an order vacating the order of reference entered herein on February 9, 1954, and as grounds therefor state:

1. This cause came on for trial before Judge Kirkland on February 9, 1954. After plaintiffs and defendant had announced through their counsel that they were ready for trial, Judge Kirkland stated that he had examined the pleadings and had decided to refer the entire cause to the Auditor. On February 9, 1954, Judge Kirkland entered an order of reference of the cause to the Auditor on the issues raised by the pleadings herein.

2. After hearing counsel for plaintiffs and for defendant at the First Meeting before the Auditor, the Auditor on March 5, 1954 entered an order requiring the deposit of $875.00 by the parties, one-half of $437.50 to be deposited by plaintiffs and the other half or $437.50 to be deposited by the defendant. Counsel for defendant and defendant volunteered to deposit the $437.50 and consented thereto. In a later hearing before the Auditor on June 28, 1954, defendant's counsel acknowledged that he had consented to the deposit by defendant of $437.50. Plaintiffs promptly deposited their $437.50 on March 11, 1954.

105 3. Judge Kirkland entered an order on April 6, 1954, after hearing in open court, denying defendant's motion for additional security for costs to be posted by plaintiffs.

4. The Auditor held a hearing on April 9, 1954 on defendant's motion to vacate the Auditor's said order of March 5, 1954, which required the deposit of indemnity with the Auditor for costs, and denied said motion.

5. The defendant has failed and refused to deposit with the Auditor the $437.50 required by the said order of the Auditor dated March 5, 1954. His failure so to do is reported in the Auditor's preliminary report to the Court dated June 28, 1954, and defendant's refusal to make said deposit is stated by him under oath in his affidavit of July 12, 1954 on file in this cause.

6. The said order of the Auditor dated March 5, 1954 was entered pursuant to authority contained in Local Civil Rules, Rule 15 (Rules of the United States District Court for the District of Columbia).

7. Plaintiffs are being denied their right to a trial by defendant's contumacious conduct toward this Court.

/s/ John J. Donnelly
/s/ Margaret H. Earley

---

110 [Filed July 19, 1954] Civil Action No. 111-51

AFFIDAVIT OF MARGARET H. EARLEY IN OPPOSITION TO DEFENDANT'S OBJECTIONS TO PRELIMINARY REPORT OF AUDITOR FILED JUNE 29, 1954, AND IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S ANSWER AND ALL PLEADINGS FILED IN THIS CAUSE BY DEFENDANT, AND FOR JUDGMENT AGAINST DEFENDANT; AND, IN THE ALTERNATIVE, FOR AN ORDER VACATING THE ORDER OF REFERENCE ENTERED HEREIN ON FEBRUARY 9, 1954

District of Columbia, to wit:

Margaret H. Earley, being first duly sworn, deposes and says:

That she is a member of the bar of this Court and an office associate of John J. Donnelly, Esq., one of the attorneys for the plaintiffs herein; that because of the absence from the city of John J. Donnelly on March 5, 1954, she was present at the first meeting before the Auditor in this cause, called by the Auditor to consider execution of the Court's order of reference dated February 9, 1954; that the Auditor heard counsel for the parties on the matter of their estimate of the time required for a hearing; that the Auditor then made an estimate of five days' hearing time; that she heard the Auditor announce that he would require a deposit of $875.00 as his indemnity for costs based upon the Auditor's own estimate of five hearing days, and she heard John H. Connaughton, Esq., counsel for defendant, thereupon volunteer, sua sponte, to deposit one-half of that amount or $437.50, and saw the defendant then and there acquiesce thereto; that Nicholas J. Chase, Esq., one of the attorneys for plaintiffs then agreed to deposit a like amount on behalf of plaintiffs;

that the Auditor's order was entered on March 5, 1954 in accordance
111 therewith; that thereafter, on March 11, 1954, plaintiffs deposited with the Auditor $437. 50 in compliance with the Auditor's order of March 5, 1954; that on June 28, 1954 she was present at the second meeting before the Auditor in this cause; that during said meeting she heard John H. Connaughton, Esq., attorney for the defendant, admit that he had acquiesced in the issuance of the Auditor's order of March 5, 1954, and heard said John H. Connaughton, Esq., admit that defendant had not deposited said $437. 50 with the Auditor as indemnity for his costs and further admit that said defendant did not intend to make said deposit.

Affiant further states that the plaintiffs previously posted in this cause a bond for costs since the plaintiffs are both non-residents; that the order of Judge Kirkland dated April 6, 1954, entered after hearing, denied defendant's motion for additional security for costs; that subsequently the Auditor held a hearing on April 9, 1954, on defendant's motion to vacate and reconsider the Auditor's order of March 5, 1954 which fixed the indemnity for costs, $437. 50 to be deposited by each party, and after said hearing the Auditor denied defendant's motion and extended the time within which defendant was required to deposit his $437. 50 until May 15, 1954; and that, as aforesaid, and as reported by the Auditor in his preliminary report filed June 29, 1954 and as admitted by the defendant under oath in his affidavit dated July 12, 1954 on file in this cause, defendant has failed and refused to deposit said $437. 50 with the Auditor in compliance with the Auditor's said order of March 5, 1954.

/s/ Margaret H. Earley

Subscribed and sworn to before me this 16th day of July, 1954.

/s/ Dorothy E. Greasley
Notary Public, D.C.

* * *

112 [Filed July 22, 1954] Civil Action No. 111-51

DEFENDANTS ANSWER TO PLAINTIFFS' P. & A. IN SUPPORT OF MOTION TO STRIKE PLEADINGS, ETC.

In answer to plaintiffs' motion and points in support thereof, defendant says:

1. That said motion is premature and uncalled for. Defendant has not been ordered by the Court to advance any costs to the auditor. The auditor ruled that defendant advance costs, but that ruling is now before the Court for review. Such ruling is not an order of the Court.

2. Rule 15, this Court, upon which plaintiffs rely, does not authorize the auditor to require payment of costs by defendant. In this connection defendant refers to his "Objections to Auditor's Preliminary Report," on file herein.

3. Rules 13 and 14, this Court, cited by plaintiffs, do not apply to the defendant. They relate only to parties seeking affirmative relief. Defendant is not seeking affirmative relief.

4. The motion and affidavit in support thereof states that defendant's counsel, at a meeting before the auditor, volunteered, sua sponte, to deposit costs in amount $437. 50. Counsel did no such thing. He did not object to the auditor's ruling, because he thought that the auditor had authority for such ruling, which he later found not to be the case. BUT, his non-objection was coupled with a demand for security for such costs from the non-resident plaintiffs. Plaintiffs opposed said demand and it was denied. Later, defendant's counsel informed the auditor that as security was denied, his acquiescence, or goodness of heart was withdrawn, or words to that effect.

Plaintiffs' motion is without merit, is out of order, and should be denied.

/s/ John A. Savage, Defendant

Affidavit and service next page.

114 [Filed July 28, 1954]

ORDER

Upon consideration of the Auditor's preliminary report filed herein on the 29th day of June, 1954; defendant's sworn objections thereto; the affidavit of Margaret H. Earley in opposition to defendant's said objections; plaintiffs' motion to strike defendant's answer and all pleadings filed in this cause by defendant and for judgment against defendant, and, in the alternative, for an order vacating the order of reference entered herein on February 9, 1954; plaintiffs' points and authorities and affidavit of Margaret H. Earley in support of said motion; defendant's points and authorities in opposition thereto; and after argument in open Court, it is, by the Court, this 28th day of July, 1954

ORDERED, That the Order of the Auditor entered March 5, 1954, requiring the deposit of an indemnity of $875.00 in the equal amounts of $437.50 by plaintiffs, and $437.50 by defendant be, and it is hereby, confirmed, and

IT IS FURTHER ORDERED, That plaintiffs' motion to strike defendant's answer and all pleadings filed in this cause by defendant and to enter judgment against defendant be, and the same hereby is, granted; provided, however, that if defendant, within five days from the date of this Order shall deposit with the Auditor his share of said indemnity in

115 the amount of $437.50, then, in that event, plaintiffs' motion to strike defendant's answer and all pleadings filed in this cause by defendant, shall stand denied.

/s/ EDWARD A. TAMM
Judge

[Certificate of Service]

116 [Filed Sept. 15, 1954] Civil Action No. 111-51

MOTION FOR FURTHER PROCEEDINGS TO CARRY INTO EFFECT PLAINTIFFS' JUDGMENT AGAINST DEFENDANT

Plaintiffs respectfully move the Court for an order fixing further proceedings to be had herein for the purpose of carrying into effect the judgment entered on the 28th day of July 1954 for the plaintiffs against the defendant, and as grounds therefor state:

The Court (Tamm, J.) on the 28th day of July 1954 made the following order:

> "ORDERED, That the Order of the Auditor entered March 5, 1954, requiring the deposit of an indemnity of $875.00 in the equal amounts of $437.50 by plaintiffs, and $437.50 by defendant be, and it is hereby confirmed, and
>
> "IT IS FURTHER ORDERED, That plaintiffs' motion to strike defendant's answer and all pleadings filed in this cause by defendant and to enter judgment against defendant be, and the same hereby is, granted; provided, however, that if defendant, within five days from the date of this Order shall deposit with the Auditor his share of said indemnity in the amount of $437.50, then, in that event, plaintiffs' motion to strike defendant's answer and all pleadings filed in this cause by defendant, shall stand denied."

On the fifth day after the date of this order, defendant appeared at the Courthouse and left with Judge Tamm's chambers and with the Auditor's office a letter, copy of which is appended hereto as Exhibit A. The defendant also left with the Auditor's office his uncertified personal check in the amount of $437.50 which the Auditor refused to deposit for collection, instead writing the defendant a letter, copy of which is appended hereto as Exhibit B.

117 Defendant's conduct in no wise constituted compliance with the Court's order of July 28, 1954, and therefore the judgment therein granted plaintiffs stands. Defendant not only failed to comply with the order, but conducted himself contumaciously toward this court and

its auditor.

Now that judgment has been entered against the defendant, two further steps are necessary in order to carry the judgment into effect, as follows:

1. Setting the matter down for ex parte proof before a judge of this Honorable Court. (The order of reference to the Auditor as a matter of law was terminated by the judgment of July 28, 1954.) The proof to be offered by plaintiffs will not involve accounting, but simply expert testimony with respect to the market value of the rooming house business on the date of decedent's death, April 19, 1945. (Plaintiffs do not press any claim for an accounting of personalty under count 1 of the complaint, and stand on their claim in count 2 for the value of the rooming house business and in count 3 for the return of the real property.)

2. Appointing a trustee for the purpose of conveying the real property to plaintiffs, and authorizing and directing the trustee so to do.

Respectfully submitted,

/s/ John J. Donnelly

Attorney for plaintiffs

Points and Authorities

Rule 55(b)(2), F.R. Civ. P.

118 [Filed Sep. 15, 1954] Civil Action No. 111-51

Exhibit A to Plaintiffs Motion for Further Proceedings:

Washington, D.C.
1303 Fairmont St., N.W.
August 3, 1954

Fred J. Eden, Auditor
Edward A. Tamm, Judge
U.S. District Court, D.C.
U.S. Court House
Washington, D.C.

Gentlemen:

Herewith I hand to Mr. Eden my check for $437.50, demanded from me as part of the plaintiffs' costs before the auditor, in cause No. C.A. 111-51, entitled Hadlock et al v. Savage.

I am paying this under protest as there is no authority under Rule 15, for the auditor to collect costs of plaintiffs' suit from the defendant.

Rule 13, under which I am ordered to put up this money within five days, or have me (sic) pleadings stricken and judgment (sic) entered against me, refers only to parties seeking affirmative relief (plaintiffs), and provides that if such parties fail within six months to obey an order of the Court, their complaint may be dismissed, without prejudice. Defendants and answers are out.

The action taken against me is plain extortion. I shall wait fifteen days, until August 18th for you to return me this $437.50. If not returned by that time, I shall bring action in the Municipal Court against both of you, for the recovery of the extorted money, plus punative (sic) damages.

Yours very truly,
/s/ John A. Savage
John A. Savage

Original to Mr. Eden
Copt (sic) to Judge Tamm

stamp (filed
with the auditor
Aug. 3, 1954
U.S. District Court for the
District of Columbia)

119 [Filed Sep. 15, 1954] Civil Action No. 111-51

Exhibit B in support of Plaintiffs' Motion for Further Proceedings, etc.:

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA * * *

AUDITOR
United States Courthouse, Room 4401
Third Street & Constitution Ave., N. W.
Washington 1, D. C.

August 4, 1954

In Re: Hadlock vs. Savage,
Civil Action No. 111-51

Mr. John A. Savage
1303 Fairmont Street, N.W.
Washington 8, D. C.

Dear Sir:

Referring to the above-entitled proceeding:

This will acknowledge receipt of your letter of August 3, 1954, transmitting your check in the sum of $437. 50.

In view of the conditions contained in your letter transmitting the check, and in view of the charges made therein, the check will not be deposited for collection at this time, but will be held in this office pending the return to the Bench of Judge Tamm on October 5, 1954, in order that counsel for plaintiffs may submit to Judge Tamm the question as to whether or not your check, in view of your letter accompanying it, constitutes compliance with the order of Court entered July 28, 1954.

Very truly yours,

/s/ Fred J. Eden

Auditor.

E:c

CC Nicholas J. Chase, Esq., Wyatt Building, Wash., D.C.

John J. Donnelly, Esq., 1001 Connecticut Ave., N.W., Wash. D. C.

J. H. Connaughton, Esq., 717 District National Bank Bldg., Wash. 5, D.C.

122 [Filed October 12, 1954]

ORDER

Upon consideration of the plaintiffs' motion for further proceedings to carry into effect plaintiffs' judgment against defendant, points and authorities and exhibits in support thereof, the answer of defendant thereto, and after argument in open Court, it is, by the Court, this 12th day of October, 1954

ORDERED, That the plaintiffs' said motion be, and it hereby is, granted, and

IT IS FURTHER ORDERED, That this cause be set down before a nonjury Court for the purpose of taking ex parte proof from the plaintiffs and for such other and further proceedings as the nature of the cause may require.

/s/ Alexander Holtzoff
Judge

[Certificate Of Service]

---

134 [Filed October 29, 1954]

DEFENDANT'S OBJECTIONS TO PROPOSED ORDER OF JUDGMENT FOR PLAINTIFFS

Defendant was served with notice that the cause would be set for October 22, 1954 for ex parte proof. He appeared and presented his motion to strike from calendar on grounds that it was premature in that his motion to vacate Judge Holtzoff's order under which this proceeding was based, was pending, and all proceedings should be held in abeyance until said motion was disposed of. He referred in his motion to his motion to vacate Judge Holtzoff's order and his motion for leave to withdraw his letter of August 3, 1954. That motion stated among other things:

2. "THAT THE STATUTE OF LIMITATIONS PRECLUDES SAID ORDER, AS APPEARS FROM DEFENDANT'S ANSWER TO PLAINTIFFS' COMPLAINT, and

3. There is no authority or by rule, for "ex parte proofs," in this cause, as provided in said order of October 12.

2(a). The plea of the statute of limitations is set out in defendant's answer, from which it appears that the statute commenced to run in June, 1945 while this action was not started until January 1951, five years and seven months after their right of action accrued. Luchs v. Christman, 42 App. D.C. 326.

Syllabus. "An action against the Commissioners of the District of Columbia to compel the execution and delivery of a tax deed to the holder of a tax sale certificate is not one for the recovery of land so as to render applicable the fifteen year period of limitations prescribed by Section 1265, D.C. Code 31 Stat. at L 1389 Chapter 854, but falls within the further provision of that section requiring that no action, the limitations of which is not specifically prescribed in the section, shall be brought after three years subsequent to its accrual.

135 District-Florida Corporation v. Penny, 62 Ap D.C. 258; 66 F 2nd 794.

Syllabus. Action for fraud in inducing plaintiff to purchase realty, not brought within three years after cause of action accrued, held barred. D.C. Code 1929 T 24 Sec. 341.

The plaintiffs introduced at the hearing October 22, the files in the probate case showing that defendant was granted letters of administration in June 1945. The defendant had it stipulated, for the purpose of showing when the plaintiffs' right of action commenced. The plea of statute of limitations was squarely raised in defendant's answer, in his motion to vacate Judge Holtzoff's order, which was before the Court on October 22, and it is squarely raised here. The action should be dismissed.

COURT IS WITHOUT JURISDICTION TO RENDER MONEY JUDGMENT

Proofs must be probata allegata. The proofs must conform to the allegations. One cannot sue for one thing and have judgment for something else. Let us take a look at the complaint. It asks for cancellation of deeds and an accounting of the rooming house business. That doesn't

entitle plaintiffs to a money judgment. It would entitle them to an accounting, after which a money judgment would be in order, provided the accounting warranted it.

The basis of plaintiffs' suit lay in their claim that they were at great distances from Washington and defendant took advantage of that and deceived them. By that they were obliged to prove what they alleged. But at the hearing plaintiffs Hadlock admitted that he was right here in Washington, lived at defendant's home for TWO WEEKS, immediately after Mrs. de Montis' death. Thus, even had defendant deceived him, which he did not, caveat emptor would apply. "Equity protects the vigilant, not those who slumber on their rights."

MISCONDUCT OF COUNSEL

The first thing counsel for plaintiff did when the case came on, was to thrust a 37 page brief into defendant's hands. Defendant objected to that and the Court said it would not be admitted. This statement was repeated once or more times upon further objections. But counsel put it in, piecemeal, in spite of the Court's ruling.

DEFENDANT WAS TAKEN BY SURPRISE

Defendant taken entirely by surprise when confronted with plaintiffs' witness' testimony as to the value of the properties, and claims that there were no joint deeds, asked for a continuance that he might produce witnesses and proofs. He made the request under Rule 55, F. R. C. P.
136 which provides that in hearings on defaults such as this is claimed to be, the Court "SHALL accord a right to jury trial to the parties. Counsel for plaintiffs said that Judge Pine had denied a jury trial. That is true, but that was under different circumstances. Here we are proceeding under Rule 55 which clearly and in no unmistakable terms, REQUIRES a jury trial.

"Where one is assailed there he may defend", is a rule of law as old as law itself. This is an equity proceeding. A Court of equity is a court of conscience. It will not permit this defendant to be charged with all the gross crimes he is charged with here, and not allow him an opportunity to disprove them. It was not until this matter came before the

Court October 22, that he was apprised of the nature of the "misrepresentations", he was supposed to have made. He knew only of what the complaint showed. That was that he has misrepresented the value of the property, and that possibly the existance of the joint deeds was questioned. Now he finds out for the first time, on October 25, when he received a copy of the proposed order,what he was charged with doing. As to the value of the property, plaintiffs produced a witness who said they were worth over $13000 in 1945. He admitted that he had never been inside the houses, but came to his conclusions by looking at the outside. He said that there was a row of houses, all looking the same. That sales or loans had been made on two of them in 1946 and 1948 which made him appraise 1346 and 1348 Fairmont at over $13000. Several of these houses have been converted into apartments. 1350 Fairmont has been so converted. The cost of conversion might run as high as $3000. Neither 1346 nor 1348 has an apartment. Not a single private bath. When this case came on before Judge Kirkland for trial, defendant had two witnesses, both residents of the 1300 block Fairmont Street, one a licensed real estate broker, who would testify that the de Montis houses were not worth over $9000 and $9500 respectively, in 1945. And that was what defendant settled with the plaintiffs for. And he also paid administration expenses and debts of estate, waived commission and saved attorneys fees, making over $12500 which he should be credited with on 1346. This is all set out in defendant's answer in detail. Plaintiffs were paid $5000 for the equity in 1346. They had waived their claim to the equity in 1348 worth $4000, in favor of Augustin de Anievas in accordance with Mrs. de Montis' wishes. Defendant had paid Mrs. Anievas over $1000 for Augustin's tuition, secured her for the balance, and she would have been paid in full before this time, had not this suit stopped it.

137 EVIDENCE AS RO JOINT OWNERSHIP OVERWHELMING

Plaintiffs' counsel came to defendant's home where he let them have all his private files from which they photographed a mass of correspondence. Defendant had nothing to conceal, and if they could find any "misrepresentations" he wanted them to do so. He offered them the

evidence of joint ownership, fifteen law suits where defendant and Mrs. de Montis sued and defended jointly but they were not interested. Defendant knew that he could prove the truth of every statement he had made.

When defendant came to court for trial before Judge Kirkland, he had, besides witnesses to prove the values he had set on the properties, a mass of proof of the existence of the lost deeds. He had the records in fifteen law suits wherein he and Mrs. de Montis had sued and defended jointly, in which she had declared sometimes under oath, that she and defendant were joint owners of the properties and business. He had joint notes for large sums, signed by himself and Mrs. de Montis one for $400 at Riggs Bank for money to pay up delinquent trusts, another at another bank for a like amount, to put a new boiler in 1346, and others. He had a joint business privilege license to conduct business at 1346 and 1348 jointly, issued to him and Mrs. de Montis. The records in the law suits were in the Municipal Court, District Court and the Court of Appeals. Defendant had a strong case to restore the lost deeds. But he waived that in return for the plaintiffs waiving claim to 1348 in favor of Auguston de Anievas, in accordance with Mrs. de Montis' wishes. Defendant didn't have to tell Mrs. de Anievas about Mrs. de Montis' wishes. He could have sued to restore the deeds and had a good chance of taking everything. The details as to the Anievas matter are told in defendant's answer, to which defendant commends the Court. Anticipating that counsel will declare that the Anievas story is all a big lie, and that there never was any such boy, defendant attaches as Exhibit "A" a paper entitled "The Music Education League" etc. which contains a photograph and story of Augustin de Anievas. Defendant allowed Mrs. Anievas $4000 for the equity in 1348, secured her for the sum, and has paid her over $1000. Had it not been for this suit, defendant would have had her all paid up long ago.

TREATMENT OF THE HEIRS

Counsel makes much of defendant's bad treatment of the heirs. Of Mrs. Helmbold's sad condition, etc. This is all explained in defendant's answer. Mrs. de Montis did not wish to leave anything to Mrs. Helmbold. She was in bad condition and probably might not long survive

so that her drunken husband would get it. And she felt that she had done enough for Carmita during her lifetime. She had sent her money for years. She let her and family live in her Gig Harbor, Washington home, rent free, for two years, and finally wound up by practically giving the home to Carmita. When questioned as to this, Mr. Hadlock said that he had heard that that was true. As for Ivan, he and Mrs. de Montis had not been on speaking terms for over eight years. We didn't know where he was. Defendant located his wife through the Veterans Bureau and advised him of his sister's death. He didn't come to the funeral although but 100 miles distant. He testified that the reason he didn't come was that he was tied up in some secret work for the government. But he told the defendant at the time that he didn't come because he had had considerable expense because of his daughter's wedding, and that he was broke. Just how defendant sought to keep plaintiffs in ignorance. At once on Mrs. de Montis's death, defendant sent Ivan $25 to cover his expense to come to Washington. He came, and lived in defendant's home for two weeks. He testified to that. Defendant showed him the records in the joint law suits; told him everything there was to tell about the estate. Now he testified that defendant did not tell him anything. He didn't tell him about the trust. That is refuted by plaintiffs' own exhibits, correspondence with plaintiffs letters wherein defendant told them all about the trusts. In fact there was much said about the trust on 1348, which was facing foreclosure. Defendant was trying to get Carmita to settle up that he could take title and refinance thus saving foreclosure. They claim that defendant delayed settlement. It was Carmita who did that, as letters read by counsel will testify.

Ivan testified that "Mr. Savage convinced me that he owned the property." That was why he signed the deed. Could anything be sillier than to state that because he was convinced that Mr. Savage owned the property, he Mr. Hadlock, would give Mr. Savage a deed to his (Savage's) property. What would Savage want of a deed to property that he already owned? What Savage did convince Ivan of was that there was strong evidence of the existence of the lost deeds. And that was the truth. And

that Mrs. de Montis wished to leave the equity to 1348 to Anievas. He knew all about that. He has been to New York and visited Mrs. Anievas and Augustin. And he had expressed the desire to have Mrs. de Montis wished as to Anievas carried out.

139 FOUL BLOWS

Plaintiffs say that defendant had been convicted of crime. They knew full well that defendant was released from St. Elizabeths and taken to Court by a writ of habeas corpus. The writ was granted on defendant's showing that he had been convicted illegally. That the lower court certified a false, deleted transcript of the record to the court of appeals so that defendant had had no review of the complete record. That the sentence under which he was held was not a valid sentence. There was a vacancy on the district bench at Denver at the time, so the U.S. Attorney got the poor old senile clerk of the court, to execute a sentence. At the time defendant wasn't present, but was in St. Paul, Minnesota, nearly a thousand miles away. Defendant had been thrust into St. Elizabeths by the Warden of Leavenworth, without notice or hearing of any kind. After several continuances the case finally came up. Bill Collins was in charge as Assistant U.S. Attorney. He called defendant out into the hall and told him that they didn't want him and would not contend further, but that the case had to be dismissed. Defendant said that he would not consent to dismissal unless he was released first. Then it might be dismissed. Collins agreed and released defendant. Then defendant's attorney signed consent to dismissal. The record does not show this. It occurred out in the hall of the old court house. Defendant had brought charges against Warden Biddle and Prison Physician Yohe, for sending him to St. Elizabeths. Mrs. Willebrandt, Assistant Attorney General sent for defendant, went into his charges. She then fired Yohe summarily and suspended Biddle, who was later discharged. Later defendant was granted an unconditional pardon by the President. Plaintiffs' counsel knew all about this and if he had a spark of decency in him, he wouldn't even mention it.

PUERILE CONDUCT OF COUNSEL

In the court room on the 22nd, the defendant spoke to Mr. Hadlock and they began conversing. Ivan had been an intimate friend of defendant for many years. Immediately counsel for plaintiffs ordered Hadlock not to speak to the defendant and the defendant not to speak to Hadlock. He evidently was alarmed lest a reprochment might be in the making and he would lose his job.

140 THE ORDER

1. The preamble. Says that defendant had a full hearing, and opportunity to produce witnesses, etc. Defendant had no opportunity to produce witnesses. He asked for a continuance for that purpose, but it was denied. The procedure is set out at first three pages hereof, which show that defendant did not have a fair chance of defense.

1. There was no evidence that Mrs. Helmbold was an invalid and helpless on the date of Mrs. de Montis' death. She had not been well for years, but from her letters to defendant she did not seem to be "helpless".

2. Defendant perpetrated a fraud by applying for letters when he was not qualified because of an alleged conviction of crime thirty-five years ago. This is the first that defendant has heard about that, as a disqualification. There IS NO MENTION OF IT IN THE COMPLAINT, and therefore the Court is without jurisdiction to entertain it.

2. Defendant misrepresented that he was a creditor of the estate, when in fact he was not, but on the contrary owed the estate substantial sums of money. There was not one syllable of testimony to that effect. Who paid the undertaker $600 if not the defendant? Plaintiffs introduced the files in the probate case which proved that defendant was a creditor. He paid the undertaker $600 for his services and cemetary lot. He had telegraphed Mrs. de Montis $400 when she was at the peace conference at Mexico City, out of his personal account at Riggs bank. Mrs. de Montis had sent back $200 of it to her own account at Riggs, because she had decided to come home, didn't need it and didn't want to carry that much money on her person. Counsel knew this full well as they had gone over all of defendant's personal papers in the case. THERE IS NO

MENTION OF THIS IN THE COMPLAINT. Just how much did defendant owe the estate, and for what? We submit that it is a contempt to ask the Court to sign such a statement.

3. Defendant represented that if he were appointed under special bond it would expedite settlement. So it would. But after defendant had obligated himself for the purpose of giving Mrs. Helmbold quick relief, she wouldn't answer letters, but sat tight for one year from Mrs. de Montis death, not one year from defendant's appointment, and then demanded an immediate settlement. Defendant's pleas and Ivan's pleas, wouldn't budge her. The delay was solely her fault.

141 5. Defendant represented that settlement could not be made until after the elapse of twelve years from date of his appointment. Defendant never made any such statement. There is not one syllable of testimony to that effect. On the contrary, letters put in the record by plaintiffs signed by defendant, show that he was doing his best to effect an immediate settlement. Defendant did tell the plaintiffs that he was tied up on the bond for twelve years. He thought that he was. The Deputy Register of Wills and his counsel, Mr. Bastian, both told him so. He found out later that it was five years. He explained that to the Court.

6. Defendant told the plaintiffs that the realty was under his control. He said no such thing. On the contrary he told them that he was unable to renew the trust on 1348 because an administrator could not pledge the real estate. He urged a settlement so that he could get title and renew the trust and prevent foreclosure. He was responsible for the renting and keeping the houses in order. If he did not, who would? Would counsel have defendant abandon the houses and let the tenants leave and the buildings go to ruin?

7. That defendant misrepresented that the estate was insolvent. How can they say that? Defendant represented that the equity in 1346 was worth $5000 and that in 1348 was worth $4000, and that of personal property $1000, $10,000 in all. And the plaintiffs received from defendant $5000 for their interest in the estate. There was no testimony, that defendant recalls, that the estate was insolvent.

8. That defendant falsely represented that the rooming house business was his own and not that of the estate. Let us look at what is said on page "4" supra as to joint ownership.

9. That defendant falsely represented that there were joint deeds, lost, etc. See what is said about that on page "4" supra.

10. That defendant falsely represented that the value of the properties were the assessed values. The law specifically says that real estate should be assessed at its true value. Defendant was warranted in standing on those values, for that was the law. But he didn't. He settled within plaintiffs at much higher values. See what is said at page "3" in that behalf. Plaintiffs introduced at the hearing, but did not read, a settlement sheet on defendant's purchase of 2722 13th Street NW, near 1346 Fairmont Street in September, 1944, at $11,400. Defendant had intended and will, use this to prove the values he claimed for 1346 and 1348 Fairmont Street.

142 11. 2722 13th Street is worth $5000 more than 1346 Fairmont. When this case started Harry Rubin was in charge. Defendant invited him up to go over the values and the properties. After inspecting 1346 and 1348 he inspected 2722 13th Street. He exclaims "There is no comparison.", and has never appeared in the case again. He had a conscience, 2722 was a larger house, had a 40 foot back yard, porches on all floors, rear, and expensive awnings on every window. Inside, it was in practically new condition. At that the neighbors said it wasn't worth over $10,500, but it was going to colored, and defendant paid the "colored price" to save the neighborhood. 1334c Fairmont Street, four doors from 1346, was sold in 1945 for $11,000. It is a four story fourteen room house, with 165 foot lot back yard and garage. 1346 is a three story, ten room house, 100 foot lot, no back yard at all, and no garage. Yet plaintiffs want the Court to believe that 1346 was worth $13,000 in 1945. There are other comparisons, which defendant was ready to submit at the trial before Judge Kirkland, which he will submit if given an opportunity, in this case.

VALUE OF ROOMING HOUSE BUSINESS

12. Plaintiffs had a witness swear that the business at 1346 and 1348 was worth $3500, and they want defendant to pay them accordingly. The rooming house business there is not worth anything. In 1953 the gross income was $3628. The expenses were over $4000. A loss of over $400. In 1954 it will be more. The income will not be more, and maybe less than in 1953. And defendant had to spend $1011.82 for a new boiler and burner at 1346. One might ask, why continue? The answer is that rooms have not rented well since the high prices for food, which make people want apartments. Those who can are converting rooming houses to apartments. Defendants would have converted 1346 and 1348 to apartments long ago, but for the pendency of this suit which put a cloud on the title and made it impossible for him to borrow money to make the conversion. Thus plaintiffs have damaged defendant immeasurable, with this suit.

13. Defendant convinced the plaintiffs that they would receive nothing whatever, unless they deeded to him. He never made any such statement. He may have said that unless he could stop foreclosure on 1348 that it would go to sale at auction at some loss.

14. Plaintiffs made something of the fact that defendant in reporting to the inheritance tax assessor said that there were no joint owners. There were no joint owners of record. All that he could say about that was what he has said about the lost deeds. And he could scarcely go into that with the assessor.

143 Plaintiff made something of the fact that defendant took a power of attorney from Mrs. de Montis when she went to Mexico, authorizing him to conduct the business. That power was given so that if defendant was confronted with something that required action by Mrs. de Montis, he had her authority to act for her. She had expected to be gone for six months, but became ill and came home in less time. There is nothing queer, or even unusual in such procedure. Many a business or a property is owned by undisclosed principals. There is many a valid deed in existence, unrecorded. Mrs. de Montis had unrecorded joint deeds to defendant's two houses. It was none of the public's business what their business

relations were. It was their privilege to keep their affairs to themselves.

There is much more to be said about the matter, but the defendant is limited in time to get this memorandum in and he hasn't time to analyze plaintiffs' proposed accounting concerning which he has never been consulted. He notes however, that as he has said, he had to spend $1011.82 for a new boiler and burner for 1346. He had to borrow it and is still on the note at the Hamilton Bank.

MOTION TO WITHDRAW LETTER
OF AUGUST 3, IS BEING HELD
IN ABEYANCE.

The Court announced that he was holding that motion in abeyance. Defendant has already retracted the letter. His motion asks for its acceptance. That should cure the so-called "default", and remove grounds for further proceeding. It seems to defendant that the Court might say, "Oh well; he just blew his top. It was somewhat provoking. We'll forgive him." "Blessed are the merciful, for they shall receive mercy." Sermon on the mount.

Respectfully submitted,

/s/ John A. Savage
Defendant

DISTRICT OF COLUMBIA: SS

[Certificate Of Service]

[JURAT dated Oct. 28, 1954]

---

148 [Filed October 29, 1954]

ORDER CARRYING INTO EFFECT FINAL
JUDGMENT OF JULY 28, 1954

This matter having come on to be heard before the Court pursuant to the Order entered October 12, 1954 which set the cause down for the purpose of taking ex parte proof from the plaintiffs and for such other and further proceedings as the nature of the cause may require, default judgment against defendant having been entered on July 28, 1954, and the plaintiffs and the defendant having each been given due and ample notice of said facts, upon consideration of the pleadings herein, the evidence offered by

the plaintiffs, the evidence offered by the defendant, and after full hearing of plaintiffs and of defendant, and the defendant having had full and ample opportunity and notice to bring such witnesses as he may have desired to call and to adduce such evidence as the defendant may have desired to adduce, it is by the Court this 29th day of October, 1954 FOUND:

That the plaintiffs are the sole heirs at law and next of kin of Myrtle deMontis, who died on April 19, 1945, and were on said date;

That her estate is covered by Administration No. 65508 of the Probate Court of this Court;

That on the date of decedent's death, April 19, 1945, Mrs. Carmita L. Helmbold, her sister and one of her two sole heirs at law and next of kin and a plaintiff herein, was an invalid and helpless, and still is, and was then and still is in dire financial circumstances;

149 That Defendant Savage on April 19, 1945, and continually from then to this date, has been fully aware of the helpless situation of the co-plaintiff, Mrs. Carmita L. Helmbold;

That Defendant Savage fraudulently and dishonestly induced the plaintiffs to consent to his appointment as administrator of said estate under special bond;

That Defendant Savage perpetrated a fraud on this Court by applying under oath for letters of administration in that he was not qualified under law to serve as administrator because he had been convicted of an infamous crime, to wit, conviction of fifteen counts of mail fraud for which he served a part of his sentence in the Leavenworth Penitentiary;

That Defendant Savage fraudulently and dishonestly misrepresented himself to the plaintiffs, the sole heirs at law and next of kin of decedent, as a creditor of the estate, and misrepresented that he thereby had some rights with respect to appointment as administrator, when in truth and in fact he was not a creditor of the estate but he was indebted to the estate and owed the estate substantial money;

That as a material part of his fraud, Defendant Savage misrepresented to plaintiffs that if he were appointed as administrator under

special bond, he would expedite settlement of the estate and make distribution to them possible in less than one year;

That immediately after his appointment as administrator under special bond, Defendant Savage fraudulently misrepresented to plaintiffs that settlement of the estate and distribution thereof to them could not be made until after twelve years had elapsed from the date of his qualification as administrator;

That Defendant Savage fraudulently and dishonestly misrepresented to plaintiffs that the realty owned by decedent, namely 1346 and 1348 Fairmont Street, N.W., Washington, D.C., was under his control as administrator, when in truth and in fact it was not;

150 That Defendant Savage fraudulently and dishonestly misrepresented to plaintiffs that the estate was insolvent, when in truth and in fact it was not;

That the plaintiffs are and were the sole heirs at law, and also the sole next of kin, and therefore that the sole heirs at law and next of kin are and were identical;

That Defendant Savage unlawfully and fraudulently misrepresented to plaintiffs that decedent's rooming-house business was his own and was not the property of the estate of decedent;

That Defendant Savage fraudulently and dishonestly misrepresented to plaintiffs that the two pieces of real estate owned by decedent on the date of her death, 1346 and 1348 Fairmont Street, N.W., Washington, D.C., were subject to joint deeds permitting survivorship to him as a joint tenant, and misrepresented that such joint deeds had not been recorded and had been lost, when in truth and in fact there were no such joint deeds;

That Defendant Savage fraudulently and dishonestly misrepresented the fair market value of said two pieces of real estate to the plaintiffs at the assessed value thereof, $8281 with respect to one, and $8241 with respect to the other, when in truth and in fact the fair market value of each said piece of real estate on April 19, 1945, the date of decedent's death, was not less than $13,000, each;

That Defendant Savage fraudulently and dishonestly convinced plaintiffs that they would not receive anything whatever from the estate unless they executed to him quit-claim deeds for their respective interests in the realty and instruments assigning to him their rights in the estate;

That Defendant Savage fraudulently and dishonestly induced plaintiffs to execute quit-claim deeds, conveying to him their respective interests in the two pieces of real estate, 1346 and 1348 Fairmont Street, N.W., Washington, D.C., and also to execute void assignments of their rights in the estate of decedent, for $2,500 to each of them;

151 That pursuant to said fraud, Defendant Savage paid $2,500 to plaintiff Helmbold and only $1000 to plaintiff Hadlock;

That Defendant Savage filed an inheritance tax return with the District of Columbia Government in August 1946, declaring the share of plaintiff Helmbold to be $4968.78 from the estate and the share of plaintiff Hadlock to be $4968.77 from the estate, and Defendant Savage paid tax thereon;

That Defendant Savage at no time informed the plaintiffs, or either of them, that he had recognized their shares to be that which he reported to the District of Columbia Government in said inheritance tax return, or in any other amount;

That plaintiffs, in the hearing before this Court, did not press for an accounting of decedent's personal effects,and offered no evidence in support of count one of their complaint filed herein;

That Defendant Savage fraudulently and dishonestly misappropriated to his own use and ownership, decedent's rooming-house business;

That Defendant Savage from the date of decedent's death, April 19, 1945, to the present, unlawfully withheld from plaintiffs the title and possession of the two pieces of real estate, 1346 and 1348 Fairmont Street, N.W., Washington, D.C.;

That the fair market value of decedent's rooming-house business on the date of her death, April 19, 1945, was not less than $3,500;

That the fair rental value of each said house from April 19, 1945, to the present, was not less than $125 per month per house, or $28,500 for one hundred fourteen (114) months from April 19, 1945, to the present;

That the plaintiffs have been fraudulently and dishonestly defrauded by Defendant Savage of $32,000 from April 19, 1945 to the present;

That the moneys due and owing by Defendant Savage to plaintiffs amount to $32,000;

152 That the plaintiffs in the hearing before this Court tendered to Defendant Savage the following moneys as an offset against their rights;

(a) $2,500, representing money paid by Defendant Savage to Plaintiff Helmbold;

(b) $1,000 paid by Defendant Savage to Plaintiff Hadlock;

(c) $2,952.36, representing the amount of real estate taxes paid by Defendant Savage to the District of Columbia Government for the properties since April 19, 1945;

(d) $4,225.60, representing payments made by Defendant Savage on the mortgage on 1346 Fairmont Street and insurance thereon since April 19, 1945;

(e) $3,773.13, representing net payments made by Defendant Savage on the mortgage on 1348 Fairmont Street and insurance thereon, since April 19, 1945. (The payments so made total $5,148.13. Savage, however, refinanced this property on February 20, 1947, and pocketed $1,375. This amount is subtracted from $5,148.13.);

That the plaintiffs tendered in total, in the hearing, to Defendant Savage the amount of $14,451.09, as an offset against their right to $32,000.00 from Defendant Savage; and

That the plaintiffs' said judgment of July 28, 1954, against Defendant Savage is in the amount of $17,548.91, insofar as the accounting is concerned.

IT IS CONCLUDED BY THE COURT:

That the two alleged deeds executed by the plaintiffs in September

1946 (by Plaintiff Helmbold) and in January 1947 (by Plaintiff Hadlock et ux) to 1346 and 1348 Fairmont Street, N. W., Washington, D. C. (Lots numbered 33 and 34 in Joseph A. Blundon's subdivision of lot numbered ten (10) Block numbered Thirty-one (31) "Columbia Heights," as per plat recorded in the office of the Surveyor for the District of Columbia in Liber County 11 at folio 51, also known for taxation purposes as Lots 33 and 34, Square 2861) are, and were, void and are set
153 aside and held for naught; and

That the plaintiffs are entitled to a judgment against Defendant Savage in the amount of $17, 548. 91.

NOW, THEREFORE, IT IS ORDERED BY THE COURT UNDER THE JUDGMENT OF JULY 28, 1954:

That the said deeds to 1346 and 1348 Fairmont Street, N. W., Washington, D. C. (Lots numbered 33 and 34 in Joseph A. Blundon's subdivision of lot numbered ten (10) Block numbered Thirty-one (31) "Columbia Heights," as per plat recorded in the office of the Surveyor for the District of Columbia in Liber County 11 at folio 51, also known for taxation purposes as Lots 33 and 34, Square 2861) be, and they hereby are, vacated, held for naught, and set aside, and all right, title and interest, in fee simple, in and to said real properties is found to be in the plaintiffs herein, Ivan K. Hadlock and Carmita L. Helmbold, as tenants in common, as of the death of Myrtle deMontis on April 19, 1945, and continually from that date to the present; and

That plaintiffs be, and hereby are awarded judgment against Defendant Savage, in the amount of $17, 548. 91.

/s/ RICHMOND B. KEECH

Judge

[Certificate of Service]

176 [Filed Nov. 16, 1954] Civil Action No. 111-51

ORDER DENYING MOTION FOR NEW TRIAL

Upon consideration of the defendant's motion for new trial, and memorandum of points and authorities in support of motion for new trial, the plaintiffs' points and authorities in opposition thereto, the defendant's reply thereto, and after argument in open Court, it is by the Court this 16th day of November, 1954

ORDERED that the defendant's motion for new trial be, and the same hereby is, denied and overruled.

/s/ RICHMOND B. KEECH
JUDGE

[Certificate of Service]

---

177 [Filed Dec. 7, 1954] Civil Action No. 111-51

ORDER DENYING MOTION FOR LEAVE TO WITHDRAW LETTER OF AUGUST 3, 1954 TO JUDGE TAMM AND AUDITOR EDEN

Upon consideration of the defendant's motion for leave to withdraw his letter of August 3, 1954 to Judge Tamm and Auditor Eden, points and authorities in support thereof, plaintiffs' points and authorities in opposition thereto, and defendant's reply to plaintiffs' said opposition, and after argument in open Court, it is by the Court this 7th day of December, 1954

ORDERED that the defendant's motion for leave to withdraw his letter of August 3, 1954 to Judge Tamm and Auditor Eden be, and the same hereby is, denied.

/s/ ALEXANDER HOLTZOFF
JUDGE

[Certificate of Service]

---

178 [Filed Dec. 13, 1954] C. A. 111-51

Washington, D.C.
1303 Fairmont Street, N.W.
December 8, 1954

Dear Judge Tamm:

The other day Judge Holtzoff suggested that I write you a letter of apology for writing you as I did last August 3rd. The suggestion is a good one and I am glad to say that I do apolige for the letter and retract it.

There is however, some basis for miyigation in the circumstances. In the first place when the case was refered to the auditor, the plaintiffs said they wanted five days. I took one day. The auditor fixed his fees at $875, of which $625 was for a stenographer for five days hearings; $125 per day. He then ruked that I, the defendant, pay half, or $437.50. I was denied security for these costs from the non-resident plaintiffs. I consulted most eminent authorities, who stated that it was an unheard of thins for a defendant to have to advance the costs of the plaintiff's suit. I refused to put ip the costs and the case went to the court, which ordered me to put up the costs in five days or have my pleadings stricken and judgment against me. I didn't have the money and couldn't borrow it, being borrowed up to my neck at three banks and my credit exhausted. I was obliged to get my sister to go on my note to get the money.

I could fine no authority for any penalty for a defendant, for failure to comply with an order of the court. Plaintiffs are subject, in such a case, to being required to comply with the order within six months, or have their complaint dismissed, without prejudice.

It burned me up. I blew my top and wrote as I did on August 3rd. I am sorry and trust that you will accept my regrets.

"Blessed are the merciful; for they shall receive mercy."
(Sermon on the mount)

Hon. Edward A. Tamm
U.S. District Court, D.C.
U.S. Court House
Washington DC

Yours very truly
/s/ John A. Savage

179 [Filed January 6, 1955]

Civil Action No. 111-51

ORDER

Upon consideration of defendant's motion to vacate Judge Holtzoff's order of October 12, 1954 holding defendant in default, defendant's points and authorities filed in support thereof, plaintiffs' points and authorities in opposition to said motion, affidavit of Margaret H. Earley in support of plaintiffs' opposition to defendant's motion, and the order of Judge Keech entered on the 29th day of October 1954 denying defendant's previous motion to vacate the order of October 12, 1954, it is, by the Court, this 6 day of January, 1955

ORDERED, that defendant's motion to vacate Judge Holtzoff's order of October 12, 1954, holding defendant in default be, and the same hereby is, denied.

/s/ ALEXANDER HOLTZOFF
Judge

[Certificate of Service]

181 Civil Action No. 111-51

WRIT OF ASSISTANCE

To CARLTON BEALL, United States Marshal for the District of Columbia,

Greeting:

WHEREAS, according to the tenor and true meaning of a judgment entered on the 29th day of October, 1954 in the above entitled cause, it was decreed that John A. Savage and any and all persons, firms, associations and corporations holding under the said John A. Savage deliver possession to plaintiffs of the lands and premises situated in the City of Washington, District of Columbia and being all those lots, pieces, or parcels of land with the buildings and improvements thereon known as Lots 33 and 34 in Square 2861, briefly designated as 1346 Fairmont Street, N. W. and 1348 Fairmont Street, N. W. Yet he, John A. Savage, and other ill-disposed persons, his accomplices, have refused to pay obedience to the decree and detain and keep possession of the premises, in manifest contempt of Court.

Know ye, therefore, that we, being willing and desirous that justice should be done to the said plaintiffs in this behalf, do give unto you full power and authority to enter into and upon premises 1346 Fairmont Street, N. W., being Lot 34 in Square 2861, in the District of Columbia, and premises 1348 Fairmont Street, N. W., being Lot 33 in Square 2861, in the District of Columbia, immediately after the reception of this writ, and thence eject and remove all and every person or persons, firms, associations, and corporations holding possession of the same under the said John A. Savage against the tenor of the Judgment and

182 Order of this Court entered herein on the 29th day of October, 1954, and that you put and establish the said plaintiffs, their successors, assigns and nominees, through John J. Donnelly, attorney for said plaintiffs, in full peaceable and quiet possession of said premises and that you do, from time to time, as often as shall be necessary, preserve and defend the said possession of said premises by plaintiffs, their successors, assigns and nominees against all force and interruption

whatsoever, according to the true intent and meaning of said Judgment and Order and of this writ, and herein you are not in any wise to fail.

And do you return this writ in the Clerk's Office of the said Court immediately after you have executed it, and within sixty (60) days, so endorsed as to show when and how you have executed the same.

Witness the Honorable Bolitha J. Laws, Chief Judge of the said Court, this 8th day of April, 1955.

HARRY M. HULL, Clerk
By /s/ James S. Gardiner, Jr.
Deputy Clerk

RETURN

Executed the within Writ by ejecting John A. Savage and all holding under the said John A. Savage from premises 1346 and 1348 Fairmont Street, N.W., Washington, D.C. and put the same in the possession of the plaintiffs' attorney, John J. Donnelly, this 6 day of May, 1955.

1.00

CARLTON BEALL
U. S. Marshal
By /s/ William C. Hook
Deputy

Received the above-described premises from the United States Marshal this sixth day of May, 1955.

/s/ John J. Donnelly

[Filed April 8, 1955] Civil Action No. 111-51

183 ORDER

Upon consideration of the affidavit for writ of assistance filed herein by John J. Donnelly, attorney for plaintiffs, it is by the Court, this 8th day of April, 1955

ORDERED that the attached writ of assistance issue to the United States Marshal for the District of Columbia to put the said defendant, John A. Savage, and any and all persons, firms, associations and corporations holding under the said John A. Savage from the said premises, and to put the plaintiffs or their nominees in possession of the said premises and to maintain the plaintiffs or their nominees in peaceful possession thereof.

/s/ Burnita Shelton Matthews
Judge

---

184 [Filed April 29, 1955] Civil Action No. 111-51

ORDER

Upon consideration of the Order entered herein on the 8th day of April, 1955, which directed that a certain writ of assistance (which was attached to said Order) issue, and upon consideration of the statement made to the Court in open Court this 29th day of April, 1955, by the attorney for the plaintiffs to the effect that the United States Marshal does not interpret the said writ as directing him to remove and evict from said premises all furniture, furnishings and other personal property, and it appearing to the Court that in the exercise of its lawful process and in the enforcement of the final judgment entered herein on the 29th day of October, 1954, and affirmed by the United States Circuit Court of Appeals for the District of Columbia Circuit as evidenced by the mandate of said Court dated the 25th day of April, 1955, and filed in this Court on the same day, all right, title and interest can be effectively vested in the plaintiffs only by ejecting from the said

premises the defendant, John A. Savage, and all those holding under him and physically evicting from the said premises all furniture, furnishings and other personal property, now, therefore, it is by the Court this 29th day of April, 1955,

ORDERED that the United States Marshal in and for the District of Columbia be, and he hereby is, directed to evict from the said premises being 1346 and 1348 Fairmont Street, N.W., Washington, D.C., all furniture, furnishings and other personal property in the course of his execution of the said writ of assistance, and

IT IS FURTHER ORDERED that the Clerk furnish to the said United States Marshal two true and certified copies of this Order without charge or cost.

/s/ Burnita Shelton Matthews
Judge

---

185 [Filed May 10, 1955] C.A. 111-51

U. S. MARSHAL'S RETURN OF SERVICE

UNITED STATES OF AMERICA

District Of Columbia

I hereby certify and return that I served the annexed Order on the therein-named John A. Savage, and evicted from premises 1346 & 1348 Fairmont St., N.W., all furniture, & furnishings & other personal property and by handing to and leaving a true and correct copy thereof with him personally at 2722 - 13th St., N.W., in the said District at 5:45 p.m., on the 28th day of April, 1955.

/s/ Carlton G. Beall
United States Marshal.

Marshal's fees 2.00 By /s/ Wm. C. Hook, Deputy

---

190 [Filed April 27, 1955] Civil Action No. 111-51

MOTION TO VACATE PROCEEDINGS AND DISMISS COMPLAINT

Comes now Eliza T. Savage, a citizen of the United States and a resident of the District of Columbia, residing at 2722 Thirteenth Street, Northwest in said District, by her Attorney, and appearing specially for the purpose of this motion and for no other, moves the Court to vacate and set aside the various orders and decrees entered in this cause, and to dismiss the complaint herein, upon the following grounds:

That said Eliza T. Savage is not a party plaintiff or defendant in this cause, and has never been served with process to answer the complaint herein, nor been named as a party therein; whereas, in truth and in fact the said Eliza T. Savage is an indispensable party whose rights were and are involved in said suit, which rights can neither be ousted nor affected by any action of the court or parties herein without making her a party by proper process.

That said Eliza T. Savage is the owner of a joint and undivided interest in certain of the real estate which by order of this court, entered in this cause on October 26, 1954, is attempted to be divested; that she acquired such title and interest by virtue of a deed to her from the owner of the record title, said deed being executed on May 31, 1949, and recorded on October 25, 1954; that the said deed was supported by a good and valuable consideration; and that she was and is a bona fide purchaser for value with out notice of any claim of right title or interest in any other person whatsoever.

191 That the court, being without jurisdiction to hear and dispose of the issues in the cause as aforesaid, could not and did not in any way lawfully dispose of, interfere with, nor adjudicate as to the rights and interests of said Eliza T. Savage, in any manner whatsoever; but that it nevertheless has attempted and assumed to do so.

That the properties involved in the suit are Lots 33 and 34, in Block 31, as per plat recorded in the office of the Surveyor of the District of Columbia, in Liber County 11, Folio 51, and are occupied

by premises 1346 and 1348 Fairmont Street, Northwest, in said District.

WHEREFORE, said Eliza T. Savage prays:

1. That the court set aside, vacate and dismiss all orders and proceedings in said suit, and dismiss said suit for failure to make her a party thereto, and to stay the execution upon its said orders.

2. And for such further and other relief as may be necessary and appropriate.

/s/ WM. A. GALLAGHER

* * * *

Attorney for Eliza T. Savage

Points and Authorities

The court has no jurisdiction to proceed in any cause where an indispensable party is absent.

Florida v. Georgia, 17 How. (U.S.) 478,

Swan Land, etc. Co. v. Frank, 148 U.S. 603,

Russell v. Clark, 7 Cranch, (U.S.) 69.

Leave to file granted, /s/ Curran, J., 4/27/55

192 [Filed April 28, 1955] Civil Action No. 111-51

ORDER ON MANDATE

John A. Savage, defendant herein, having appealed to the United States Circuit Court of Appeals for the District of Columbia Circuit from the judgment entered in this cause on the 29th day of October, 1954 and said Court having issued its mandate dated the 25th day of April, 1955, wherein it was ordered that the appeal of said John A. Savage be dismissed and his motion for a further extension of time to file the record in said Court be denied, with costs assessed in $ none in favor of appellees (plaintiffs herein);

Now upon the mandate of the United States Circuit Court of Appeals for the District of Columbia Circuit, dated the 25th day of April, 1955

IT IS ORDERED, ADJUDGED, AND DECREED that the judgment entered in this cause on the 29th day of October, 1954, be and it is in all respects affirmed, and that such execution and proceedings be had in this cause as according to right and justice and the laws of the United States, the said appeal not withstanding.

/s/ R. B. Keech
Judge

[Certificate of Service]

193 [Filed April 29, 1955]

C.A. No. 111-51.

APPLICATION FOR STAY OF EXECUTION AND/OR OTHER RELIEF.

Eliza T. Savage, having filed in this cause her motion, on April 27, 1955, asking that certain orders and decrees of this court be vacated and set aside, and this suit dismissed for want of jurisdiction, and the same having been served on that day upon the United States Marshal; and later upon counsel for the plaintiffs, they being non-residents of the District of Columbia, and the basis for the motion being that applicant was not made a party to this suit although an indispensable party; she now respectfully represents to the Court as follows:

1. That notwithstanding the aforesaid, and at the direction of the plaintiffs, the said Marshall, by and through his deputies, has proceeded with execution of a writ of assistance, issued without notice to applicant, and has taken possession of two parcels of real estate, to wit, premises 1346 and 1348 Fairmont Street, Northwest, in said District, the same being held by applicant as owner of a joint undivided interest, with right of survivorship, under a deed executed May 31, 1949, for a good and valuable consideration; and said deputies have notified the occupants of said premises to quit said premises before 10 a.m. of April 29, 1955, otherwise to be forcibly evicted, together with furniture and possession of theirs and of this applicant;

NOW, THEREFORE, Eliza T. Savage prays:

1. That the said Marshal be ordered to cease and desist from his proceedings aforesaid; and the counsel for the plaintiff be ordered to take no further proceeding against any property of this applicant under or by virtue of any order or decree herein, until her motion

194 filed on April 27, 1955, described above, shall be fully heard and ruled upon by this court, and the question of jurisdiction therein presented to the court shall be considered by the court.

2. And for such further relief as to the Court may seem just and proper.

/s/
ELIZA T. SAVAGE.

[Verification - Jurat]

/s/
WM. A. GALLAGHER,
Attorney for Applicant,
* * *

---

195 [Filed April 29, 1955]

C.A. No. 111-51

ORDER

Upon consideration of the motion to vacate proceedings and dismiss complaint and points and authorities in support thereof and of the application for stay of execution and/or other relief, both filed herein by Eliza T. Savage, and after argument in open court by William A. Gallagher, Esq., representing said Eliza T. Savage, John J. Donnell, Esq., representing the plaintiffs, and Rufus Stetson, Assistant United States Attorney as amicus curiae, and the Court being fully advised in the premises, it is by the Court this 29th day of April, 1955,

ORDERED that the said motion and the said application be, and they hereby are, denied and overruled.

/s/ Burnita Shelton Matthews
JUDGE

[Certificate of Service]

---

196 [Filed January 20, 1956]

C.A. No. 111-51

The Clerk of said Court will enter my appearance for defendant John A. Savage,

/s/ Wm. A. Gallagher
* * * Attorney for defendant.

---

240 [Filed January 20, 1956] C.A. No. 254-56

COMPLAINT TO SET ASIDE FRAUDULENT DEEDS

1. Ivan K. Hadlock is an adult citizen of the United States and a resident of the State of Virginia and brings this action in his own right. F. Joseph Doerr brings this action as ancillary executor of the estate of Carmita L. Helmbold, deceased, duly qualified in the Probate Court of this Honorable Court.

2. John A. Savage, defendant, is an adult citizen of the United States and a resident of the District of Columbia, and is sued in his own right and as administrator under special bond of the estate of Myrtle de-Montis, deceased. Eliza T. Savage, defendant, is an adult citizen of the United States and a resident of the District of Columbia and is sued in her own right.

3. Defendant John A. Savage is administrator under special bond of the estate of Myrtle deMontis, deceased. Defendant John A. Savage was sued in Civil Action No. 111-'51 individually and as administrator of the estate of Myrtle deMontis, deceased, by the plaintiffs herein. (Carmita L. Helmbold, who died subsequent to the entry of final judgment is repre-

241 sented herein by her ancillary executor as co-plaintiff.) In said action, the then plaintiffs, now fully represented, sued to set aside certain deeds (respecting Lots 33 and 34 in Square 2861, which are not involved in this action) and for a money judgment. This Honorable Court, on October 29, 1954, entered a final judgment which included a money judgment in the amount of $17,548.91. Defendants John A. Savage and Eliza T. Savage attended the trial. They were personally present on October 22, 1954 when Judge Richmond B. Keech announced in open Court that he was awarding said money judgment. This announcement was made on Friday afternoon, October 22, 1954. On the next succeeding Monday, October 25, 1954, Defendant John A. Savage, or his agent, appeared at the Office of Recorder of Deeds of the District of Columbia before 9:00 A.M. and presented for record deeds to all of the parcels of real property in the District of Columbia owned by Defendant John A. Savage, as follows:

A deed, recorded as Instrument 37278 in Liber 10295 at Folio 433, purporting to have been executed on June 1, 1942, between John A. Savage, grantor, and Eliza T. Savage,

grantee, purporting to convey a joint, equal and undivided right and title to the property conveyed, in both parties thereto as tenants by the entirety, in Lot 30, Square 2860, briefly described as 1303 Fairmont Street, N. W.

A deed, recorded as Instrument 37279 in Liber 10295 at Folio 435, purporting to have been executed on March 1, 1945, between John A. Savage, grantor, and Eliza T. Savage, grantee, purporting to convey an equal, joint and undivided right and title to the property conveyed, in both parties thereto as tenants by the entirety, in Lot 45, Square 2860, which said property is designated as 2722 Thirteenth Street, N. W.

A deed, recorded as Instrument 37280 in Liber 10295 at Folio 437, purporting to have been executed on June 1, 1942, between John A. Savage, grantor, and Eliza T. Savage, grantee, purporting to convey a joint, equal and undivided right and title to the property conveyed, in both parties thereto as tenants by the entirety, in Lot 77, Square 2854, briefly described as 1327 Harvard Street, N. W.

Defendants John A. Savage and Eliza T. Savage are not husband and wife, but instead are brother and sister.

4. Defendants were on full notice that said purported deeds were subject to the judgment announced by Judge Keech of this Court on October 22, 1954 and formalized in writing and formally entered
242 on October 29, 1954. The appeal from this judgment was subsequently dismissed by the United States Court of Appelas for the District of Columbia Circuit; the mandate was returned to this Court, and judgment was entered on the mandate.

5. Defendant Eliza T. Savage gave no consideration for said deeds and is a fraudulent grantee. Defendant John A. Savage, with respect to said deeds, is a fraudulent grantor. In depositions in aid of execution of said judgment of October 29, 1954, Defendant Eliza T. Savage, on January 21, 1955, claimed her privilege under the Fifth Amendment to the Constitution when interrogated with respect to the

consideration for said deeds, and later withdrew her claim of privilege. At a later session of said depositions, held on February 3, 1955, Defendant John A. Savage introduced in the deposition a statement showing that Defendant Eliza T. Savage had, in 1919, sought to aid him financially with respect to his then prosecution for, and conviction of, fifteen (15) counts of using the United States mails in a scheme to defraud.

6. Plaintiffs have been unlawfully and fraudulently prevented from executing on said judgment to their great damage.

7. The purported deeds described above in paragraph 3 are fraudulent in fact and in law and should be set aside and held for naught.

WHEREFORE, the premises considered, plaintiffs pray that:

1. This Honorable Court set aside and hold for naught the purported deeds from Defendant John A. Savage to Defendant Eliza T. Savage described as follows:

> A deed, recorded as Instrument 37278 in Liber 10295 at Folio 433, purporting to have been executed on June 1, 1942, between John A. Savage, grantor, and Eliza T. Savage, grantee, purporting to convey a joint, equal and undivided right and title to the property conveyed, in both parties thereto as tenants by the entirety, in Lot 30, Square 2860, briefly described as 1303 Fairmont Street, N. W., Washington, D. C.
>
> A deed, recorded as Instrument 37279 in Liber 10295 at Folio 435, purporting to have been executed on March 1, 1945, between John A. Savage, grantor, and Eliza T. Savage, grantee, purporting to convey an equal, joint and undivided right and title to the property conveyed, in both parties thereto as tenants by the entirety, in Lot 45, Square 2860, which said property is designated as 2722 Thirteenth Street, N. W., Washington, D. C.

243 A deed, recorded as Instrument 37280 in Liber 10295 at Folio 437, purporting to have been executed on June 1, 1942, between John A. Savage, grantor, and Eliza T. Savage,

grantee, purporting to convey a joint, equal and undivided right and title to the property conveyed, in both parties thereto as tenants by the entirety, in Lot 77, Square 2854, briefly described as 1327 Harvard Street, N. W., Washington, D. C.

2. That this Honorable Court award punitive damages against the defendants and each of them in the amount of $10,000.

3. That this Honorable Court award such other and further relief as to the Court may seem just and proper.

/s/ John J. Donnelly
Attorney for Plaintiffs

/s/ Margaret H. Earley
Attorney for Plaintiffs

* * * *

[Verification]

[Jurat]

197 [Filed October 29, 1956]

C. A. No. 111-51

MOTION TO STRIKE AND VACATE JUDGMENT

Now comes the defendant and under Rule 20 of this Court, moves the Court to strike, vacate and set aside the order of judgment of October 29, 1954, and for grounds therefor states and shows;

I.

That said judgment is sham and void, in that it contains and is predicated on false statements. Sham pleadings are stricken; So should be sham judgments. The judgment is void for want of jurisdiction of the Court.

1. First paragraph first page of judgment of October 29th, 1954 states that defendant had full ample opportunity and notice to bring witnesses and to adduce evidence, etc., Defendant had no such notice or opportunity. The only notice he received was a post card stating that the case had been set down for "EX-PARTE PROOFS.". That amounted to a notice that he was not to be heard. He appeared however and moved that the cause be stricken from the calendar for the reason that there was no such thing as "ex-parte proofs" known to the law, the rules or the practise. The Court was proceeding under Rule 55, F.R.C.P. That rule provides that if a party is in default, after he has appeared, the Court may conduct hearing to ascertain the truth of allegations, make investigation, make references, and SHALL ACCORD A JURY TRIAL TO THE PARTIES. Defendant read that rule to the Court, who asked Mr. Donnelly, counsel for plaintiffs, what he had to say about jury trial. Mr. Donnelly replied that Judge Pine had said that it was not a case for a jury. Defendant said that Judge Pine was not under Rule 55. That this Court was, and that the rule called expressly for a

198 jury trial. The Court overruled the motion and proceeded. Defendant asked for a continuance that he might summon his witnesses. That was denied, and the Court went on with on with the ex-parte proofs. Defendant attempted to introduce the records in seventeen law suits wherein Mrs. deMontis had stated, sometimes under oath, that she and

defendant were joint owners of the real estate in question. The Court waved these aside. In some of the suits Mrs. deMontis had written the pleadings in her own handwriting, captioned "Myrtle de Montis and John A. Savage, Trading as Myrtle de Montis." These things proved beyond doubt that Mrs. deMontis and the defendant were joint owners of the real estate and the business. The defendant was not permitted to offer said proofs. Mr. Donnelly shoved a 37 page brief into defendant's hands and offered the brief. Defendant objected and the Court said "It will not be received." Then Mr. Donnelly began offering photostats of carbon copies, which defendant, rightly, thought were exhibits from the excluded brief. He objected. The Court said "It is not before the Court," or similar statement. The defendant, in one of the then pending motions again raised the bar of the statute of limitations, which had run nearly twice, before the suit was started.

2. First paragraph, second page. The Court says that the defendant on April 19, 1945 "and continually from then to this date, was fully aware of the helpless situation of the plaintiff Mrs. Helmbold." There was no evidence to that effect and in fact defendant hadn't heard of or from Mrs. Helmbold for over four years and didn't know where she was. Mr. Donnelly let be known that Mrs. Helmbold was in El Cajon Sanitarium in California. Defendant wired the Sanitarium asking about her condition and received a reply reading "Mrs. Helmbold not able to travel alone but otherwise in good condition." Defendant called Victor leBre, in El Cajon and asked him to see Mrs. Helmbold and write defendant of her condition. Mr. Le Bre replied saying that he had visited her and she was going about the sanitarium and caring for herself, and that so far as he could see, she was in good health. Defendant offered the telegram and letter at a motion for new trial, but to no avail.

3. Second paragraph second page. Says that defendant fraudulently and dishonestly induce the plaintiffs to consent to his appointment as administrator under special bond. Defendant qualified as administrator as a creditor of estate. He asked plaintiffs to consent to special

bond, for their benefit solely. He told them under the usual bond it would take a year to settle the estate, while under special bond he could settle it immediately. He gave this bond in order that he could help
199 Mrs. Helmbold out without delay Mrs. Helmbold then wouldn't answer letters. Defendant couldn't hear from her until a year from the date of Mrs. deMontis' death when she wrote demanding an immediate settlement.

4. Third paragraph second page. Says that defendant perprated a fraud on this Court by representing that he was qualified to act as administrator when he was not qualified under law as he had been convicted of an infamous crime, viz. mail fraud. In the first place we do not think that mail fraud is an infamous crime, nor do we believe that even though it were, that fact would disqualify him. Defendant showed that the so-called conviction had been voided by by his release on habeas corpus, on the ground that in the case the record on appeal had been falsified, material portions thereof having been deleted; and that the so-called sentence under which he was held was not a sentence at all, it not having been pronounced by a judge, but by the clerk of the court/ And on top of that defendant was in St. Paul, Minnesota when the clerk of the court in Denver Colorado "pronounced" the sentence. And in addition to that defendant had received a full and unconditional pardon from President Roosevelt. Mr. Donnelly was waving a copy of the pardon, claiming that it did not clear defendant, Yet the Court, with full knowledge of the facts, signed the order. The order in the record shows that a copy of it was mailed to defendant on October 25, 1954, while it was not signed until October 29. Donnelly wrote the order and Judge Keech forthwith signed it. Defendant discovered, by accident after the ex-parte proceeding that Judge Keech had been some years before, intimately associated with Donnelly. Judge Keech was corporation counsel and Donnelly was his assistant for a long time;

5. Fourth paragraph, second page. Says that defendant fraudulently represented himself as a creditor of the estate when in truth and fact he was not a creditor but he was indebted to and owed the estate

substantial money. This is a false statement. And we do not recall that there was any evidence offered to sustain it. Defendant could have produced abundant proof had he had a chance that he was a creditor in substantial amount.

6. Fifth paragraph second page. Here we find a truthful statement. It says that defendant represented that if her were appointed under special bond he would be able to effect settlement in less than one year. That is true and defendant could and would have settled it in much less that a year but for the facts as before related, that Mrs. Helmbold wouldn't answer letters; defendant couldn't hear from her, until one year after Mrs. deMontis death when she wrote demanding immediate settlement.

200 7. Sixth paragraph, second page. Says that defendant immediately after his fraudulently represented to plaintiffs that the estate could not be settled until twelve years had elapsed from date of his appointment. That is a complete falsehood and known to be such when prepared by Donnelly. We do not believe that any evidence was offered to support such an absurd charge Defendant did tell plaintiff that he had tied himself up for twelve years on the bond, which he at the time believed, because his counsel said it was twelve years, and the deputy register of wills told him the same thing. The limitation on bonds generally runs for twelve years, but as defendant found out later, it runs only five years on an administrator's bond.

8. Seventh paragraph, second page. Says that defendant fraudulently and dishonestly represented to plaintiffs that realty was under his control as administrator when it was not. Another falsehood. Defendant never made such representation but on the contrary told them that he had no control over the realty and hence could not renew the mortgage on 1348 unless he procured title to it himself. That the administrator could not pledge the realty Defendant does not believe that any evidence was offered to support this infamous charge.

9. First paragraph, third page. Says that defendant fraudulently and dishonestly represented to plaintiffs that the estate was insolvent.

We do not believe that there was any evidence offered to support that charge. Defendant never made such representation. On the contrary he represented that there was sufficient in the estate to pay plaintiffs $5000 for 1346 and Mrs. deAnieavis $4000 for 1348. How could defendant do that if the estate was "insolvent?"

10. Third paragraph, third page. Says that defendant fraudulently represented that the rooming house business was his and was not the property of the estate. We do not believe there was any evidence offered to prove that charge. Had defendant been permitted he would have proved by Mrs. deMontis' statements in seventeen joint law suits that defendant and she were joint owners of the realty and the business. That they were co-makers of notes for considerable sums borrowed to put into the business and that they had a joint business privilege license from the District. False again.

11. Fourth paragraph, third page. Says that defendant fraudulently represented that the properties were subject to joint deeds between Mrs. deMontis and himself, but in truth and face there were no such joint deeds. Defendant attempted to offer proof of the existence of such deeds, but the court would him do so. The same can be said
201 as to this as is said in the preceding paragraph.

12. Fifth paragraph, page three. Says that defendant falsely represented that the assessed value of the property was the market value. He did tell them what what the assessed value was, and he would have been warranted in standing on that value as the law provides that property be assessed at its true value. But defendant settled with plaintiffs for amounts much in excess of that value. Plaintiffs claim that the value of the properties in 1945 was $13000 each. Plaintiff had a witness who so testified. But he based his estimate on a sale and a loan made in 1947 and 1948 on similar properties. But that did not prove the value in 1945. And besides his testimony was practically worthless for he said that he had not been inside the houses he mentioned and knew nothing about them but from exterior observation. 1346 and 1348 are of a row of eight houses. They all look alike from the outside.

But five of these houses have been converted into apartments, For instance 1350 owned by Mr. Canton, and next door to 1348 has been converted into apartments. Mr. Canton says that he put $5000 into his house improving it and converting it into apartments. But its exterior appearance is the same as 1346 and 1348. Defendants had witnesses, experts in that line, and owners of property in that block, who have made affidavits in this case, and were to testify for defendant, who would have testified that 1346 and 1349 were not worth over $9000 and $9500 in 1945. Their affidavits so state. Defendant paid plaintiffs $5000 for 1346, assumed a mortgage of $4762, paid their inheritance taxes, expenses of administration and debts of estate, all amounting to over $10,000, and he waived his administrator's commission and saved attorneys fees. Had he been credited with these items, it would have amounted to over $12,000. And he settled with Mrs. deAnieavas on 1348 in a corresponding amount. He had already paid Mrs. deAnieavas $1300 for her son's tuition in music, and when this suit started no further payments were made as defendant felt that he could not continue until the suit was settled.

13. Sixth paragraph, page three. Says that defendant told plaintiffs that unless they conveyed to him that would not receive anything whatsoever. He never told them any such thing and we do not believe there was any evidence that he did. He might have told them that unless he got title 1348 would be foreclosed and they would get less. Which was true.

202 14. Last paragraph, page three and first paragraph, page four. Says that pursuant to said fraud defendant paid to Helmbold $2500 and only $1000 to Hadlock. Defendant paid Hadlock $1050 in cash and there was due him a balance of $1450 on goodnotes. Defendant offered that balance to Hadlock, but Hadlock wrote defendant that he "would appreciate it if defendant would hold it for him until this suit is settled without doubt." He referred to a divorce suit his wife had against him and he didn't want the money in his jurisdiction to figure in a property settlement. That was the last letter defendant received from Hadlock.

It was in 1948 and he hasn't answered letters since. Hadlock was paid $1050 in cash and $1450 in good notes. That he wouldn't take payment of the balance due him and wanted defendant to hold it, was no fault of defendant. Hadlock was paid in full.

15. Second paragraph, page four. Says that defendant filed an inheritance tax report fixing plaintiffs' shares in estate at $4968. each. He paid them and de Anieavas more than that, considering expenses he paid as enumerated hereinbefore. Plaintiffs waived their claim to 1348 in favor of Augustin de Anieavis, in accordance with Mrs. deMontis' wishes. Their only interest was in 1346, for which they were overpaid.

16. Third paragraph page four. Immaterial.

17. Plaintiffs did not press for an accounting of decedent's personal effects. In the complaint they accused defendant of stealing the jewelry, disposing of the personal effects and not accounting therefor. Defendant's sister Eliza sold the jewelry, some $900 worth and remitted to plaintiffs, excepting a few pieces which she sent them. And defendant loaned Mrs. Helmbold $100 on the jewelry, which he did not hold out on her. He let her keep it. For that kindness he was accused of stealing the jewelry. Now counsel very magnanimously did not press that claim.

We believe we have said enough so far. We shall not attempt to analyze the accounting stated in the last two pages, only to observe that defendant never had a chance to see these figures before, unless they were in the 37 page brief thrust into his hands at the start of the proceeding and which the Court said would not be received; and to state that defendant informed the Court that he had then recently installed a new boiler and oil burner in 1346 at a cost of $1000, which he didn't seem to get credit for, and that the charge for "rent" had no business
203 in the case as they were not suing for rent, but for "an accounting of the rooming house business."

II.

COURT WAS WITHOUT JURISDICTION TO TRY CASE BECAUSE BARRED BY STATUTE OF LIMITATIONS

The action was barred by the statute of limitations which provides that no such action SHALL be brought after three years. 12; 201 D. C. Code 1940.

Plaintiffs' right of action accrued when defendant was granted letters of administration, June 8, 1945. Plaintiff filed their action January 8, 1951, five years and seven months after letters were issued. THE COURT HAD NO JURISDICTION TO ENTERTAIN AN ACTION WHICH IS PROHIBITED BY CONGRESS.

III.

COURT WAS WITHOUT JURISDICTION TO ENTER JUDGMENT FOR "RENT"

The Court awarded judgment for $17, 5000 for "rent." Plaintiffs were not suing for rent, but instead, for "an accounting of the rooming house business." Under the complaint no money judgment could be awarded, unless and until an accounting had been had showing something due the plaintiffs. And it would have had to have been from "an accounting of the rooming house business." It could not have been for "rent." Clearly there was no jurisdiction for the award of this judgment.

IV.

FRAUD BY PLAINTIFFS: ON COURT AND DEFENDANT

Defendant being unable to pay the costs of appeal, petitioned for leave to appeal in forma pauperis. In opposition John J. Donnelly, attorney for plaintiffs, filed an affidavit declaring under oath that Eliza T. Savage, defendant's sister, had, on deposition, testified that she had deposited in her bank account during October, November and December 1954, $1700 of defendant's funds. Donnelly's sworn statement was false in is entirety. Miss Savage testified to no such thing, She accounted for her deposits and that their sources were other than from defendant. The record proves this. Donnelly succeeded in

blocking defendant's motion for leave to appeal in forma pauperis and crippled defendant in his appeal.

204

V.

FAILURE TO JOIN INDISPENSABLE PARTY DEFENDANT

Plaintiffs were suing for concellation of defendant's deeds to 1346 and 1348 Fairmont Street NW. In 1949 defendant had given his sister Eliza T. Savage a deed to joint interest in these properties in their entirety. These deeds were on record were on record before the entry of judgment in this case. Plaintiff had knowledge of this, yet did not join Miss Savage as party defendant. Her title to these properties were unaffected by the judgment, and remains unimparied of record. Cancelling defendants deeds did not effect Miss Savage's title. Yet the judgment declared title in the plaintiffs. It should be vacated for that reason, if for no other. Miss Savage was an indispensible party to any action conveying these properties to plaintiffs.

NO AUTHORITY FOR "EX-PARTE PROOFS."

The judgment was found on a proceeding for "ex-parte proofs." There is no such proceeding authorized by law, the rules or the practice, after a party has appeared. We have covered that at paragraph "1"; "T" supra,

VII.

HOW IT HAPPENED

The Court will doubtless wonder how such things as are described here, could happen. When the case came on for trial before Judge Kirkland he referred it to the auditor for report. The auditor can claim his fees in advance. He fixed his fees at $875., $625 of which was allocated to the reporter for five days hearing. $125 a day for a stenographer! AND HE RULED THAT THE DEFENDANT SHOULD PUT UP HALF: $437.50 OF PLAINTIFFS' COSTS OF SUIT, Defendant objected and demanded a nonresident cost bond. The Court denied that. Judge Holtzoff. Judge Tamm ordered defendant to deposit $437.50 in five days, or have his pleadings stricken and judgment

against him. Defendant had a hard time getting the money and had to have his sister borrow it for him. He deposited his check for $437.50 within five days and with it a letter of protest. The auditor kept the check, still has it. But he wrote a letter to defendant sending a copy to Mr. Donnelly suggesting, in effect, that was in order to determine whether or not defendant's payment, under the protest,
206 was a compliance with the order. Such motion was filed and came before Judge Holtzoff. Defendant had an attorney who knew little if anything about the matter, and asked that defendant be heard in defense of the motion. The Court denied defendant his right to be heard. Nothing was said by defendant's counsel in defense of the motion, and the Court granted it. That left the way open for the "ex-parte proofs", and from there on plaintiffs had clear sailing.

VIII.

PLAINTIFFS DID NOT DO EQUITY AND SHOULD NOT HAVE BEEN PERMITTED TO SUE.

At the outset of the case defendant moved for dismissal on grounds that the statute of limitations barred the action and plaintiffs did not do equity by tender- into court the sums they had received from defendant for the deeds they sought to cancel. Judge Pine denied that motion but said it might be renewed, presumably after the matters it was based on had been pleaded. Defendant pleaded the matters by answer and renewed the motion. Judge Pine again denied it, but said "you will have your day in Court." presumably meaning that it could be raised at the trial. There never was a trial so defendant did not have his day in court, although he raised it more than once during subsequent proceedings. We submit that both these questions should be examined by the Court and action taken thereon.

IX.

We respectfully urge the Court to examine the records in this case and particularly the Motion for New Trial to set aside the "ex-parte proofs" proceeding,

In support of this motion defendant refers to and relies on the

files and records in this cause, his affidavit hereunto annexed and the law and authorities applicable in such case.

RESPECTFULLY Submitted,

/s/ John A. Savage
Defendant

[Verification - Certificate of Service - Jurat]

---

207 [Filed November 2, 1956]

Civil No. 111-51

ORDER OVERRULING MOTION TO VACATE AND STRIKE

Upon motion filed herein by the defendant to vacate and strike it is this 2nd day of November, 1956, ordered that said motion be, and the same is hereby overruled.

HARRY M. HULL, Clerk,

By Wm. Collins, Jr.
Deputy Clerk.

By direction of
Justice RICHMOND B. KEECH

---

209 [Filed November 26, 1956]

C.A. No. 254-56
C.A. No. 111-51

MOTION TO ENFORCE EQUITY DECREE

Plaintiffs respectfully move the Court to enforce its decree entered in Civil Action No. 111-51 on October 29, 1954, on which defendant's appeal was dismissed and judgment entered on the mandate of the United States Court of Appeals for the District of Columbia Circuit on April 28, 1955, and as grounds therefor state:

1. By decree entered in Civil Action No. 111-51 on October 29, 1954, plaintiffs were held by this Court to have been the owners on April 19, 1945, and continuously from that date to the date of said decree, of premises 1346-1348 Fairmont Street, N. W. in the District of Columbia, and were, as an integral part of the equitable decree,

210 awarded a money judgment against Defendant John A. Savage in the amount of $17,548.91.

2. This Court on April 8, 1955 issued a writ of assistance directing the United States Marshal to place plaintiffs in possession of said premises. (This writ was executed by the Marshal on May 5, 1955.)

3. The defendant, John A. Savage, set out to obstruct the decree of this Court by placing on record on October 25, 1954 (after the Court had in open Court announced its decision on October 22, 1954) fraudulent deeds to three other pieces of realty which purported to convey to his sister, Eliza T. Savage, an undivided or joint interest, or tenancy by the entireties, in said properties, all for the purpose of hindering, delaying and defrauding the plaintiffs herein from their rights as decreed by the Court.

4. Plaintiffs filed Civil Action No. 254-56 against Defendants John A. Savage and Eliza T. Savage for the purpose of having this Court set aside said fraudulent conveyances.

5. The answer of Defendant John A. Savage to the plaintiffs' complaint in Civil Action No. 254-56 states that Civil Action No. 111-51 is the only cause in which any alleged interference with, or violation of, the decree should be heard and adjudicated.

6. Defendant Eliza T. Savage in Civil Action No. 254-56 was duly served with the summons and complaint on January 20, 1956, and filed her answer on March 1, 1956.

7. The plaintiffs have been obstructed, at least since April 28, 1955, in enforcing the Court's decree of October 29, 1954 because of said fraudulent conveyances placed on record on October 25, 1954 by Defendant John A. Savage (defendant in Civil Action No. 111-51 and also in Civil Action No. 254-56) as a fraudulent grantor to Defendant Eliza T. Savage (defendant in Civil Action No. 254-56) as his fraudulent grantee.

8. The plaintiffs have been obstructed by the fraud of Defendant John A. Savage for more than eleven (11) years (since April 19,

1945) in receiving their just due, as recognized by this Court in its
211 decree of October 29, 1954.

WHEREFORE, the premises considered, the plaintiffs pray the Court to enter an order setting down for prompt consolidated hearing the issues, if any, in Civil Action No. 111-51 and in Civil Action No. 254-56, relating to the obstruction by Defendants John A. Savage and Eliza T. Savage of enforcement of the Court's decree of October 29, 1954 in Civil Action No. 111-51.

/s/
JOHN J. DONNELLY

/s/
MARGARET H. EARLEY
Attorneys for plaintiffs

* * *

---

214 [Filed November 30, 1956]

C. A. No. 111-51

ORDER TO SUBSTITUTE PARTY PLAINTIFF

Upon consideration of the motion filed herein by F. Joseph Doerr, ancillary executor of the estate of Carmita L. Helmbold, deceased, to substitute him as party plaintiff in the place and stead of Carmita L. Helmbold, and it appearing to the Court that Carmita L. Helmbold died testate in the state of California on the 2nd day of December, 1954, and that F. Joseph Doerr was duly appointed and qualified as her executor in the Superior Court of the State of California in and for the County of San Diego, and was duly appointed and qualified as ancillary executor of her estate in the United States District Court for the District of Columbia holding Probate Court and that both said appointments are still in full force and effect; it is by the Court this 30th day of November, 1956

ORDERED, That F. Joseph Doerr, ancillary executor of the estate of Carmita L. Helmbold, deceased, be, and he hereby is substituted as party plaintiff in the place and stead of Carmita L. Helmbold.

/s/ Burnita Shelton Matthews
JUDGE

[Certificate of Service]

---

215 [Filed December 14, 1956]

C. A. No. 111-51

MOTION TO INCREASE AMOUNT OF MONEYS DUE PLAINTIFFS FROM DEFENDANT JOHN A. SAVAGE IN SATISFACTION OF EQUITY DECREE OF OCTOBER 29, 1954

The plaintiffs respectfully move the Court to increase the amount of moneys due plaintiffs from defendant John A. Savage in satisfaction of this Court's equity decree of October 29, 1954, and as grounds therefor state:

1. The Court's decree of October 29, 1954 insofar as it ordered the payment of money by defendant John A. Savage to the plaintiffs was predicated on its finding of fraud perpetrated by Savage in the amount of $32,000 between April 19, 1945 and October 29, 1954, and the Court gave Savage a credit of $14,451.09 representing a tender which the plaintiffs made, leaving a net amount due the plaintiffs as of October 29, 1954 of $17,548.91.

2. In another section of its decree, the Court found that the plaintiffs were, and had been continuously since April 19, 1945, the owners of 1346 and 1348 Fairmont Street N. W.; that Defendant Savage had unlawfully withheld from plaintiffs the title and possession of these two properties; that the fair rental value of each said property was not less than $125 per month per property; and that the plaintiffs were entitled to a money judgment in said amount for each month by reason of Defendant Savage's unlawful detention of possession from the plaintiffs.

3. Defendant Savage failed to post a supersedeas bond pending appeal and continued to detain possession of said property until forcibly ejected therefrom by process of this Court which was finally executed on May 5, 1955. The plaintiffs are therefore entitled to additional

moneys because of the unlawful detention by Savage of said properties from October 29, 1954 until May 5, 1955 in the amount of $1,550
216 representing 6 1/5 months' unlawful detention at $125 per month per property.

4. Defendant Savage, during the period that he unlawfully detained said properties from plaintiffs prior to May 5, 1955, used water (in these properties) furnished by the District of Columbia Government in the amount of $161.20 for which the plaintiffs were required to make payment to the District of Columbia Government. Therefore, the plaintiffs are entitled to this additional $161.20.

5. The sum of $1,550.00 and $161.20 is $1,711.20, and this is the amount of moneys which the plaintiffs move the Court to add to the amount of $17,548.91 stated in the decree of October 29, 1954.

/s/
John J. Donnelly

/s/
Margaret H. Earley
Attorneys for the plaintiffs

---

218 [Filed December 14, 1956]

C.A. No. 111-51

MOTION OF PLAINTIFFS TO VACATE CERTAIN CONVEYANCES OF REAL PROPERTY MADE BY DEFENDANT TO DEFRAUD PLAINTIFFS, AND TO SUBJECT SAID REAL PROPERTY TO THE SATISFACTION OF THE DECREE IN EQUITY FOR THE PAYMENT OF MONEY

Plaintiffs respectfully move the Court (a) to vacate certain conveyances of real property by the defendant on the ground that said deeds are fraudulent as to these plaintiffs and made for the purpose of hindering, delaying and defrauding them; and (b) to subject the real estate covered by said fraudulent conveyances and owned by the defendant to the satisfaction of the decree in equity for the payment of $17,548.91 entered herein on October 29, 1954 against defendant and in favor of plaintiffs, and as grounds therefor state:

1. On Friday afternoon, October 22, 1954, when this Court sitting as a Chancellor announced in open Court its findings and judgment herein, John A. Savage was the record owner and the actual owner of the following real property (encumbered by first trusts in the present approximate amounts which are shown) in the District of Columbia:

Description	First Trust	Present Value
Lot 30, Square 2860, also known as 1303 Fairmont Street, N. W.	$4,000	$10,000
Lot 77, Square 2854, also known as 1327 Harvard Street, N. W.	2,500	10,000
Lot 45, Square 2860, also known as 2722 13th Street, N. W.	4,000	12,000

219 In other words, the defendant was seised of an equity of redemption in these three properties subject to first trusts. The plaintiffs do not dispute the priority of the first trusts, but the plaintiffs are not advised of the exact amount now due upon each of the first trusts.

These were all of the parcels of real property owned by defendant John A. Savage. Although record title to 1346 and 1348 Fairmont Street, N. W., stood in defendant's name on October 22, 1954, these properties were taken from him by the Court's decree and restored to the plaintiffs as of April 19, 1945.

2. On October 25, 1954 (which was the next succeeding Monday after announcement of the Court's judgment) defendant or his agent appeared at the office of the Recorder of Deeds of the District of Columbia and before 9:00 a. m. presented for record deeds to all of the three parcels of real estate above-described, as follows:

> A deed, recorded as Instrument 37278 in Liber 10295 at Folio 433, purporting to have been executed on June 1, 1942, between John A. Savage, grantor, and Eliza T. Savage, grantee, purporting to convey a joint, equal and undivided right and title to the property conveyed, in both parties thereto as tenants by

the entirety, in Lot 30, Square 2860, briefly described as 1303 Fairmont Street, N. W.

A deed, recorded as Instrument 37279 in Liber 10295 at Folio 435, purporting to have been executed on March 1, 1945, between John A. Savage, grantor, and Eliza T. Savage, grantee, purporting to convey an equal, joint and undivided right and interest to the property conveyed, in both parties thereto as tenants by the entirety, in Lot 45, Square 2860, which said property is designated as 2722 Thirteenth Street, N. W.

A deed, recorded as Instrument 37280 in Liber 10295 at Folio 437, purporting to have been executed on June 1, 1942, between John A. Savage, grantor, and Eliza T. Savage, grantee, purporting to convey a joint, equal and undivided right and title to the property conveyed, in both parties thereto as tenants by the entirety, in Lot 77, Square 2854, briefly described as 1327 Harvard Street, N. W.

Defendants John A. Savage and Eliza T. Savage are not husband and wife, but instead are brother and sister.

220 3. Eliza T. Savage gave no consideration for said deeds and is a fraudulent grantee. John A. Savage received no consideration for said deeds, and made the afore-mentioned conveyances to hinder, delay and defraud plaintiffs.

4. Plaintiffs are entitled to have said fraudulent deeds vacated in accordance with Title 12, Chapter 4, D. C. Code 1951.

5. The Court's decree of October 29, 1954 for the payment of $17,548.91 plus interest and costs is now a valid and outstanding lien on these three properties by virtue of Title 15, Section 103, D. C. Code 1951. The defendant's appeal from the judgment was dismissed by the United States Court of Appeals for this Circuit, and this Court on April 28, 1955, entered judgment on the mandate, affirming this Court's decree of October 29, 1954. Execution of the decree has not been stayed or superseded. The aspect of the decree requiring the

defendant to pay money to the plaintiffs in the amount of $17,548.91 (plus interest and costs) remains wholly unsatisfied.

6. The plaintiffs have made demand of the defendant for this money, and the defendant has refused to pay this money over to the plaintiffs. The plaintiffs are unable to find personal property on which to levy.

7. It is appropriate and proper that this Court appoint a trustee or trustees to sell each of said parcels of real estate at public or private sales and to satisfy from the proceeds of such sales the decree in equity for the payment to plaintiffs of $17,548.91 plus interest and costs.

WHEREFORE, plaintiffs respectfully move:

1. That this Court enter an order vacating, setting aside, and holding for naught the purported deeds from defendant to Eliza T. Savage, more fully described hereinabove in paragraph 2.

2. That judgment against defendant for foreclosure of plaintiffs' lien on the real estate be granted.

221 3. That this Court enter an order appointing a trustee or trustees to sell and convey the defendant's equitable interest in said real property, and to distribute the proceeds in the manner required by law so as to satisfy the decree in equity entered herein for the payment to plaintiffs of $17,548.91 plus interest and costs.

4. For such other and further relief as to the Court may seem just, proper and appropriate.

/s/
John J. Donnelly

/s/
Margaret H. Earley

Attorneys for plaintiffs

234 [Filed December 14, 1956] C.A. No. 111-51
C.A. No. 254-56

CONSENT ORDER

Upon consideration of the plaintiffs' motion in both cases above-captioned for enforcement of the equity decree entered by this Court on October 29, 1954 in Civil Action 111-51, of the pleadings in Civil Action 254-56, and of the plaintiffs' motion in Civil Action 111-51 to vacate certain conveyances of real property, etc., and any other motion filed therein, and upon consideration of consent of the parties hereto, it is, by the Court this 14th day of December, 1956,

235 ORDERED that the issues raised in Civil Action 254-56 and the plaintiffs' motion in Civil Action 111-51 to vacate certain conveyances of real property, etc., and any other motion filed therein, be, and they hereby are, consolidated; and it is

FURTHER ORDERED that the consolidated matters be set down for prompt trial and hearing, and that Defendant John A. Savage be, and is hereby granted, until December 28, 1956 to file supplemental pleadings if he desires to do so.

/s/ Burnita Shelton Matthews
JUDGE

Consent:
/s/ William A. Gallagher
Attorney for all defendants in both cases

/s/ John J. Donnelly
Attorney for plaintiffs

---

270 [Filed February 11, 1957] C.A. No. 111-51 C.A. No. 254-56

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE

On the 23rd day of January, A.D. 1957, the above styled causes of action came on to be heard before the Court pursuant to the consent order entered on December 14, 1956, consolidating for hearing the issues raised in the two above styled and numbered causes. The plaintiffs appeared by their counsel, John J. Donnelly and Margaret H. Earley. The defendants, John A. Savage and Eliza T. Savage, appeared in person and by their counsel, William A. Gallagher. The Court, after hearing all of the evidence adduced by both the plaintiffs and defendants and after hearing the statements and argument of counsel and being fully advised in the premises by clear and convincing proof, finds:

In Civil Action No. 111-51, the Judge who heard and tried said cause did on October 22, 1954, announce in open Court that he would enter a decree in equity in said Civil Cause No. 111-51, holding and

finding that the plaintiffs in that cause; namely, Ivan K. Hadlock and Carmita L. Helmbold, were the sole and only heirs of Myrtle de Montis, deceased; that at the time of the death of said decedent, Myrtle de Montis, she was the owner of the real estate and premises located and situated at 1346 and 1348 Fairmont Street, N.W., Washington, D.C., being more particularly described as Lots No. 33 and 34 in Joseph A. Blundon's subdivision of Lot No. 10, Block No. 31 "Columbia Heights" according to the plat recorded in the Office of the Surveyor for the District of Columbia in Liber County 11 at Folio 51;

271 said properties also being known for taxation purposes as Lots 33 and 34, Square 2861. That subsequent to the death of the said Myrtle de Montis, the defendant John A. Savage had procured deeds to the real estate and premises above described from the said plaintiffs Ivan K. Hadlock and Carmita L. Helmbold, but that said deeds were fraudulent and void and of no force and effect because the said John A. Savage had procured said deeds by fraud practiced upon said plaintiffs.

The Court further finds that on said date of October 22, 1954, in said Civil Action No. 111-51, that the Court announced in open Court that the Court would likewise enter a decree requiring payment by the defendant John A. Savage to said plaintiffs in the sum of $17,548.91.

The Court further finds that on October 22, 1954, at the time the Court made the announcement and pronouncement that it would enter a judgment and decree in favor of the plaintiffs and against the defendant John A. Savage cancelling deeds and for money judgment, that the defendant herein in Civil Action 254-56, Eliza T. Savage, was present; that she is the sister of the defendant John A. Savage who was the sole defendant in Civil Action No. 111-51; that she was present in the courtroom in 1954 throughout the hearing of Civil Action No. 111-51 and knew and understood the announcement made by the Court on October 22, 1954, as to the character of the judgment and decree that would be entered against her brother John A. Savage.

The Court further finds that on Monday morning, October 25, 1954, at approximately 9 o'clock A. M., Eliza T. Savage, one of the defendants in Civil Action No. 254-56, appeared in person and presented for record at the Office of the Recorder of Deeds for the District of Columbia, a purported deed bearing the date of March 31, 1949, executed by John A. Savage as grantor to Eliza T. Savage as grantee, purporting to convey to the defendant Eliza T. Savage an undivided joint interest and ownership in the real estate and premises located and situated at 1346 and 1348 Fairmont Street, N. W., Washington, D. C., and, that at the same time, date and place, the said Eliza T. Savage also presented for record in the
272 Office of the Recorder of Deeds of the District of Columbia, deeds to three pieces of real property owned by the defendant John A. Savage, which deeds purported to convey from the defendant John A. Savage as grantor to Eliza T. Savage, grantee, a joint, equal and undivided right, title and interest by entirety in each of said parcels of real estate more particularly described as follows: -

Instrument 37278 in Liber 10295 at Folio 433, Lot 30 in Square 2860, also known as 1303 Fairmont Street, N.W. Washington, D. C.

Instrument 37279 in Liber 10295 at Folio 435, Lot 45, Square 2860, also known as 2722 Thirteenth Street, N. W., Washington, D. C.

Instrument 37280 in Liber 10295 at Folio 437, Lot 77, Square 2854, also known as 1327 Harvard Street, N. W., Washington, D. C.

The Court further finds that the defendants John A. Savage and Eliza T. Savage, as brother and sister, have for many years maintained a close and confidential relationship, particularly with regard to the business affairs of each other; that the deed purporting to convey the premises located at 1346 and 1348 Fairmont Street, N. W., Washington, D. C., from the defendant John A. Savage to the defendant Eliza T. Savage and presented for record by the said Eliza T. Savage on October 25, 1954, was without consideration and if the said John A.

Savage had ever at any time had any interest in said two properties lastly above described, said interest had long since ceased to exist; that prior to and on April 19, 1945, these said properties were owned by and vested in Myrtle de Montis and that upon her death they vested in her sole and only heirs, Ivan K. Hadlock and Carmita L. Helmbold; all of which had been found by the decree of this Court entered in October, 1954, in Civil Action No. 111-51.

This Court further finds that the purported deed bearing date of March 31, 1949 between John A. Savage, grantor, and Eliza T. Savage, grantee, purporting to convey to the defendant, Eliza T. Savage, an undivided joint ownership in the premises located at 1346 and 1348 Fairmont Street, N.W., Washington, D.C., and which was presented for record by the defendant Eliza T. Savage on October 25, 1954, was for the purpose of clouding the title to said premises and to obstruct the decree of this Court announced on October 22, 1954.

273 The Court further finds that the purported deeds presented for record by the defendant Eliza T. Savage on October 25, 1954, purporting to convey the property at 1303 Fairmont Street, 2722 Thirteenth Street, and 1327 Harvard Street, all in northwest Washington, D. C., and hereinbefore more specifically described as to metes and bounds, were and are fraudulent and void insofar as the plaintiffs Ivan K. Hadlock and Carmita L. Helmbold are concerned.

That the said defendant Eliza T. Savage, who presented said deeds lastly above described for record on October 25, 1954, was present and knew that on October 22, 1954, a money judgment had been rendered against her brother John A. Savage in favor of the plaintiffs in Civil Cause No. 111-51 for the sum of $17,548.91, and this Court finds that the filing of said deeds for record by the said defendant Eliza T. Savage under the circumstances and at the time and place above described, was for the sole purpose of attempting to protect the real estate and premises of the defendant John A. Savage from levy and execution of the judgment that had been rendered against him on October 22, 1954, in Case 111-51.

That there was no consideration passing from the said Eliza T. Savage to the said John A. Savage, her brother, and that said deeds are invalid and void as against a judgment creditor of the said John A. Savage and particularly these plaintiffs because of the knowledge and intent of the said defendants John A. Savage and Eliza T. Savage.

The Court further finds that plaintiffs herein were entitled to the possession of the real estate and premises located at 1346 and 1348 Fairmont Street, N.W., Washington, D.C., as of October 29, 1954, by reason of the decree entered in Civil Action 111-51, on that date; that while the said John A. Savage did appeal from said decree on October 29, 1954, he did not post a supersedeas bond and that he refused to surrender to the plaintiffs the possession of said premises at 1346 and 1348 Fairmont Street, N.W.

274 The Court further finds that it was not until May 5, 1955, pursuant to a writ of assistance issued by this Court on April 8, 1955, that the plaintiffs came into possession of the said two properties located on Fairmont Street, N.W.; that the withholding of possession of said premises at 1346 and 1348 Fairmont Street, N.W., from the plaintiffs, entitles the plaintiffs to be paid the fair and reasonable rental value on said properties from the time they were wrongfully withheld by the defendant John A. Savage, which the Court finds was for a period of approximately five and one-fifth months, that the fair and reasonable rental value of said properties was not less than One Hundred Dollars per month per house, or a total of Two Hundred Dollars per month.

That under the pleadings herein and the evidence offered, the plaintiffs are entitled to a further and additional judgment against the defendant John A. Savage in the sume of $1,040.00.

The Court further finds that during the period that the defendant John A. Savage wrongfully withheld from the plaintiffs possession of said properties at 1346 and 1348 Fairmont Street, N.W., he used water on said premises furnished by the District of Columbia Government in the amount of $161.20 and failed to pay the District of

Columbia for said water; that when the plaintiffs finally secured possession of said premises they were compelled to pay to the District of Columbia Government the sum of $161.20 for said water used by the defendant John A. Savage; that therefore the plaintiffs are entitled to recover from the said John A. Savage an additional sum of $161.20, or a total for rental and the water bill herein described of $1,201.20.

The Court further finds that the decree entered in Civil Action No. 111-51 for the payment of the sum of $17,548.91, plus interest and costs, to the plaintiffs by the defendant John A. Savage remains wholly unsatisfied and that said sum of $17,548.91, together with interest and costs, and the further sum of $1,201.20, awarded herein to the plaintiffs against the defendant John A. Savage, are valid and subsisting liens against the interests of defendant John A. Savage in
275 real property in the District of Columbia.

The Court further finds that the said defendant John A. Savage had his day in Court so to speak in said Civil Action No. 111-51 and that his purported claims of unfair treatment by the Court who heard and determined said Cause No. 111-51 are without merit and substance and that the judgment so rendered by the Court on October 29, 1954, in said Cause No. 111-51 was and has been at all subsequent times valid and binding.

IT IS THEREFORE BY THE COURT CONCLUDED:

That the three purported deeds presented for record by the defendant Eliza T. Savage to the Office of the Recorder of Deeds for the District of Columbia on October 25, 1954, and recorded as Instruments 37278, 37279 and 37280 in Liber 10295 at Folios 433, 435 and 437, respectively, purporting to convey from the defendant John A. Savage to the defendant Eliza T. Savage, an equal, joint and undivided right, title and interest by the entirety in 1303 Fairmont Street, N.W. (being Lot 30 in Square 2860), 2722 Thirteenth Street, N.W. (being Lot 45 in Square 2860), and 1327 Harvard Street, N.W. (being Lot 77 in Square 2854), all in the District of Columbia, were and are fraudulent and void as to the plaintiffs herein as judgment creditors of the

defendant John A. Savage.

That the plaintiffs are entitled to a decree in Civil Action No. 111-51 for the payment by defendant of $1,201.20, in addition to the sum of $17,548.91, provided in the decree entered in said cause on October 29, 1954.

That the plaintiffs herein are entitled to a judgment foreclosing the judgment lien created by the decree of this Court entered October 29, 1954, in Civil Action No. 111-51 and by this decree and are further entitled to full assistance of this Court in enforcing their right in the satisfaction of said decrees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT:

That the said deeds to 1303 Fairmont Street, N.W., Washington, D. C. (being Lot 30, Square 2860), 2722 Thirteenth Street, N.W., Washington, D. C. (being Lot 45, Square 2860), and 1327 Harvard Street, N.W., Washington, D. C. (being Lot 77, Square
276 2854) and recorded among the Land Records of the District of Columbia as Instruments numbered 37278, 37279 and 37280 in Liber 10295 at Folios 433, 435 and 437 respectively, be, and they hereby are, vacated, held for naught, and set aside insofar as the rights of the plaintiffs herein are concerned.

That plaintiffs be, and they hereby are, awarded in Civil Action No. 111-51 a decree for the payment of $1,201.20 by defendant John A. Savage in addition to $17,548.91 awarded to plaintiffs against defendant John A. Savage by decree entered in Civil Action No. 111-51 on October 29, 1954.

The plaintiffs' lien on 1303 Fairmont Street, N.W. (Lot 30, Square 2860), 2722 Thirteenth Street, N.W. (Lot 45, Square 2860) and 1327 Harvard Street, N.W. (Lot 77, Square 2854) all in Washington, District of Columbia, be, and it is hereby foreclosed as provided by law and directed to be sold to the extent necessary to satisfy the amount of $17,548.91 with interest from October 29, 1954, and the further amount of $1,201.20 with interest from this date, and the

costs in both Civil Action 111-51 and Civil Action 254-56.

That Herman Miller, a member of the Bar of this Court, be, and he hereby is, appointed Trustee to sell, at public or private sale, and to convey the equitable interest of defendant John A. Savage in 1303 Fairmont Street, N. W., Washington, D. C., (Lot 30 Square 2860), 2722 Thirteenth Street, N. W., Washington, D. C., (Lot 45, Square 2860) and 1327 Harvard Street, N. W., Washington, D. C. (Lot 77, Square 2854) and to distribute the proceeds in the manner required by law so as to satisfy the decrees in equity entered in Civil Action No. 111-51 for the payment by defendant John A. Savage to plaintiffs of $17,548.91 plus interest from October 29, 1954 and of $1,201.20 plus interest from this date, and costs in both Civil Action 111-51 and Civil Action 254-56; PROVIDED that before entering upon his duties as such trustee, said Herman Miller post an undertaking in the penal sum of $20,000.00 with surety approved by the Court, conditioned upon the faithful performance of his duties as such trustee.

/s/
Ross Rizley
United States District Judge

February 8th, 1957

---

284 [Filed March 29, 1957]

C.A. No. 111-51
C.A. No. 254-56

ORDER

On this 20th day of March, A. D. 1957, the Court having before it for consideration, motion of defendants in the above-styled consolidated cases to amend the Findings of Fact, Conclusions of Law, and Final Decree; and the Court having given careful consideration to the same and the authorities cited in support of said motion and having also given full consideration to the opposition filed by plaintiffs to the motion of said defendants, and being fully advised in the premises, finds that the motion of said defendants is without merit and

should in all respects be overruled.

It is therefore by the Court considered, ordered, adjudged and decreed that the motion of the defendants filed herein for reconsideration and amendment of the Findings of Fact, Conclusions of Law and Final Decree heretofore entered in said cause on February 11, 1957, be and the same hereby is in all matters and things overruled.

/s/ Ross Rizley
United States District Judge

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED APR 10 1958
Joseph W. Stewart
CLERK

No. 13,994

JOHN A. SAVAGE and ELIZA T. SAVAGE,

Appellants,

v.

IVAN K. HADLOCK, ET AL.,

Appellees.

No. 13,995

JOHN A. SAVAGE and ELIZA T. SAVAGE,

Appellants,

v.

IVAN K. HADLOCK, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. DONNELLY
1028 Connecticut Avenue
Washington 6, D. C.
Attorney for appellees

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

QUESTIONS PRESENTED

This Court in its order of September 13, 1957 framed the questions on these appeals as follows:

> ". . . the appeals, however, are limited to the following issues:
>
> (1) Validity of the District Court order of July 28, 1954, and the judgment based thereon, having regard to the action of this Court in dismissing the appeal taken therefrom;
>
> (2) Standing of the appellants to contest the validity of the above-mentioned order and judgment in this proceeding."

However, the death of appellant Eliza T. Savage on March 16, 1958 has drastically modified, and simplified, consideration of these questions. Her death has rendered completely moot the appeal in No. 13,995 from the District Court's decree in Civil Action No. 254-56 (setting aside fraudulent deeds with survivorship by appellant John A. Savage to Eliza T. Savage). The only question left before the Court is the decree dated February 11, 1957 in Civil Action No. 111-51 (appealed from in No. 13,994) which aided execution of the judgment of October 29, 1954 in Civil Action No. 111-51 (from which appeal No. 12,559 was dismissed by this Court on April 25, 1955). The sole defendant in Civil Action No. 111-51 was John A. Savage, in his individual capacity and as administrator under special bond; Eliza T. Savage was not a defendant in Civil Action No. 111-51.

INDEX

	Page
QUESTIONS PRESENTED	(i)
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Order of July 28, 1954, is Valid in Every Sense	6
II. The Judgment of October 29, 1954, is Valid in Every Respect	11
III. Appellants Have No Standing to Contest Order of July 28, 1954, and Judgment of October 29, 1954 in This Proceeding	11
CONCLUSION	16

CITATIONS

Cases

Ackermann v. United States, 340 U.S. 193, 71 S. Ct. 209 (1950)	13
Cromelin v. Markwalter, 181 F. 2d 948, 14 Fed. Rules Serv. 60b. 35, 1950	15
Eichberg v. U.S. Shipping Board, etc., 51 App. D.C. 44, 273 Fed. 886, 49 W.L.R. 418 (1921)	7
Fraser v. Doing, 76 U.S. App. D.C. 111, 130 F. 2d 617, 70 W.L.R. 856 (1942)	12, 13
Gilmore v. Hinman, 89 U.S. App. D.C. 165, 191 F. 2d 652, 79 W.L.R. 1172 (1951)	15
Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645 (1909)	9
Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841 (1897)	8, 9
National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37, 75 S. Ct. 92 (1954)	8, 9
Rothschild & Co. v. Marshall, 51 F. 2d 897, C.A. 9, 1931	14
Societe Internationale, etc., v. Brownell, 96 U.S. App. D.C. 232, 225 F. 2d 532 (1955), cert. den. 350 U.S. 937, 76 S. Ct. 302, rehrg. den. 350 U.S. 976, 76 S. Ct. 430	8, 9

Rules

Rule 15, U.S. District Court for the District of Columbia	3, 5, 7, 10
Rule 37(b)(2)(iii), and Rule 37(d), F.R.Civ. P.	9
Rule 60(b), F.R. Civ.P.	13, 14, 15

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 13,994

JOHN A. SAVAGE and ELIZA T. SAVAGE,

Appellants,

v.

IVAN K. HADLOCK, ET AL.,

Appellees.

No. 13,995

JOHN A. SAVAGE and ELIZA T. SAVAGE,

Appellants,

v.

IVAN K. HADLOCK, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

On February 11, 1957 the Court below rendered a decree in two separate causes of action, Civil Action Nos. 111-51 and 254-56 (J. A. 56-63). Insofar as the decree affected Civil Action No. 254-56, it is

completely moot in that appellant Eliza T. Savage, who was a defendant only in Civil Action No. 254-56 (Appeal No. 13,995),died on March 16, 1958 (suggestion of her death filed herein by counsel for appellants). The only effect of Civil Action No. 254-56 as to her was to set aside fraudulent deeds to her as grantee, jointly and with right of survivorship, executed by appellant John A. Savage who was a defendant originally in Civil Action No. 111-51 in his individual capacity and as administrator under special bond. Appellant John A. Savage was similarly named a defendant in Civil Action No. 254-56. Examination of the complaint in Civil Action No. 254-56 (J. A. 34-37) and of the decree in both causes (J. A. 56-63) clearly establishes that with the death of Eliza T. Savage the fraudulent deeds which are the subject matter of Civil Action No. 254-56 lost whatever effect they had while she was living, because with her death on March 16, 1958, title to the three properties stood only in her theretofore joint tenant, John A. Savage. Therefore, Appeal No. 13,995 is moot and should be dismissed.

The Court's decree of February 11, 1957 (J. A. 56-63) has effect only in Appeal No. 13,994 which is from this same decree as it was entered in Civil Action No. 111-51 on the basis of appellees' motion to enforce equity decree (J. A. 48-50) and related motions filed December 14, 1956 (J. A. 51-55), and such involves only John A. Savage, individually and as administrator under special bond. And as such, the only present effect of the decree is to award appellees an additional money judgment of $1,201.20 together with costs, to foreclose appellees' judgment lien on three named pieces of real estate, and to appoint a trustee for the purpose of selling the three pieces of real estate to satisfy appellees' judgment (J. A. 62-63).

It is in this posture, therefore, that appellees make their counter-statement of the case.

In January 1951, appellees filed suit against appellant John A. Savage alleging that he had fraudulently and unlawfully preempted from them as heirs at law and next of kin real and personal property in the Estate of Myrtle deMontis who had died on April 19, 1945. On February 9, 1954 the Court below referred the matter to the Auditor (J. A. 1). Neither side objected to the reference. The Auditor held a First Meeting on March 5, 1954 as the result of which he ordered the deposit of an indemnity of $875.00, one-half (or $437.50) by each side, pursuant to Rule 15 of the Court below (J. A. 1). Appellant John A. Savage consented to, or agreed to, or acquiesced in, this order of the Auditor (J. A. 3, para. 2; J. A. 4, 4a, 4b). Appellees promptly deposited their share on March 11, 1954 (J. A. 1). The Court (Judge Tamm) on July 28, 1954 confirmed the Auditor's order, and further ordered (J. A. 4c):

> "That plaintiffs' motion to strike defendant's answer and all pleadings filed in this cause by defendant and to enter judgment against defendant be, and the same hereby is, granted; provided, however, that if defendant, within five days from the date of this Order shall deposit with the Auditor his share of said indemnity in the amount of $437.50, then, in that event, plaintiffs' motion to strike defendant's answer and all pleadings filed in this cause by defendant, shall stand denied."

Appellant John A. Savage on the fifth day after this order appeared at Judge Tamm's chambers and at the Auditor's office, leaving at each place a copy of a joint letter addressed to the judge and to the Auditor which advised them that he was handing to the Auditor a check for $437.50, and concluded with this paragraph (J. A. 4f):

> "The action taken against me is plain extortion. I shall wait fifteen days, until August 18th for you to return me this $437.50. If not returned by that time, I shall bring action in the Municipal Court against both of you, for the recovery of the extorted money, plus punative (sic) damages."

Appellees, by motion of September 15, 1954, asked the Court to set the matter down for an ex parte hearing in order to carry into effect the judgment entered by the Court on July 28, 1954 (J. A. 4d), and the Court granted this motion by order of October 12, 1954 (J. A. 5). The hearing

completely moot in that appellant Eliza T. Savage, who was a defendant only in Civil Action No. 254-56 (Appeal No. 13,995),died on March 16, 1958 (suggestion of her death filed herein by counsel for appellants). The only effect of Civil Action No. 254-56 as to her was to set aside fraudulent deeds to her as grantee, jointly and with right of survivorship, executed by appellant John A. Savage who was a defendant originally in Civil Action No. 111-51 in his individual capacity and as administrator under special bond. Appellant John A. Savage was similarly named a defendant in Civil Action No. 254-56. Examination of the complaint in Civil Action No. 254-56 (J. A. 34-37) and of the decree in both causes (J. A. 56-63) clearly establishes that with the death of Eliza T. Savage the fraudulent deeds which are the subject matter of Civil Action No. 254-56 lost whatever effect they had while she was living, because with her death on March 16, 1958, title to the three properties stood only in her theretofore joint tenant, John A. Savage. Therefore, Appeal No. 13,995 is moot and should be dismissed.

The Court's decree of February 11, 1957 (J. A. 56-63) has effect only in Appeal No. 13,994 which is from this same decree as it was entered in Civil Action No. 111-51 on the basis of appellees' motion to enforce equity decree (J. A. 48-50) and related motions filed December 14, 1956 (J. A. 51-55), and such involves only John A. Savage, individually and as administrator under special bond. And as such, the only present effect of the decree is to award appellees an additional money judgment of $1,201.20 together with costs, to foreclose appellees' judgment lien on three named pieces of real estate, and to appoint a trustee for the purpose of selling the three pieces of real estate to satisfy appellees' judgment (J. A. 62-63).

It is in this posture, therefore, that appellees make their counter-statement of the case.

In January 1951, appellees filed suit against appellant John A. Savage alleging that he had fraudulently and unlawfully preempted from them as heirs at law and next of kin real and personal property in the Estate of Myrtle deMontis who had died on April 19, 1945. On February 9, 1954 the Court below referred the matter to the Auditor (J. A. 1). Neither side objected to the reference. The Auditor held a First Meeting on March 5, 1954 as the result of which he ordered the deposit of an indemnity of $875.00, one-half (or $437.50) by each side, pursuant to Rule 15 of the Court below (J. A. 1). Appellant John A. Savage consented to, or agreed to, or acquiesced in, this order of the Auditor (J. A. 3, para. 2; J. A. 4, 4a, 4b). Appellees promptly deposited their share on March 11, 1954 (J. A. 1). The Court (Judge Tamm) on July 28, 1954 confirmed the Auditor's order, and further ordered (J. A. 4c):

> "That plaintiffs' motion to strike defendant's answer and all pleadings filed in this cause by defendant and to enter judgment against defendant be, and the same hereby is, granted; provided, however, that if defendant, within five days from the date of this Order shall deposit with the Auditor his share of said indemnity in the amount of $437.50, then, in that event, plaintiffs' motion to strike defendant's answer and all pleadings filed in this cause by defendant, shall stand denied."

Appellant John A. Savage on the fifth day after this order appeared at Judge Tamm's chambers and at the Auditor's office, leaving at each place a copy of a joint letter addressed to the judge and to the Auditor which advised them that he was handing to the Auditor a check for $437.50, and concluded with this paragraph (J. A. 4f):

> "The action taken against me is plain extortion. I shall wait fifteen days, until August 18th for you to return me this $437.50. If not returned by that time, I shall bring action in the Municipal Court against both of you, for the recovery of the extorted money, plus punative (sic) damages."

Appellees, by motion of September 15, 1954, asked the Court to set the matter down for an ex parte hearing in order to carry into effect the judgment entered by the Court on July 28, 1954 (J. A. 4d), and the Court granted this motion by order of October 12, 1954 (J. A. 5). The hearing

was held on October 22, 1954 and resulted in Judge Keech's extensive findings, conclusions, and order of October 29, 1954 which recites at the outset that the defendant John A. Savage had ample notice of the hearing, that his evidence was considered in a full hearing, "and the defendant having had full and ample opportunity and notice to bring such witnesses as he may have desired to call and to adduce such evidence as the defendant may have desired to adduce" (J. A. 16-21). Judge Keech signed this order only after carefully considering "Defendant's Objections to Proposed Order of Judgment for Plaintiffs" (J. A. 5-16).

Defendant John A. Savage's timely motion for a new trial was heard and denied by Judge Keech on November 16, 1954 (J. A. 22).

Defendant John A. Savage timely noted an appeal to this Court (Appeal No. 12, 559) which he failed to perfect and his appeal was dismissed. On the mandate of this Court dated April 25, 1955, the Court below on April 28, 1955 (J. A. 31):

> ". . . ORDERED, ADJUDGED, AND DECREED that the judgment entered in this cause on the 29th day of October, 1954, be and it is in all respects affirmed, and that such execution and proceedings be had in this cause as according to right and justice and the laws of the United States the said appeal notwithstanding."

Previously appellees had obtained from the Court below a writ of assistance as to two pieces of real estate which was executed by the U. S. Marshal on May 6, 1955 (after entry of the order on the mandate). (J. A. 25-28.)

Even though the appeal in No. 13, 995 is moot because of the death of Eliza T. Savage, it should be noted parthentically that she, through her present counsel, moved on April 27, 1955 in Civil Action No. 111-51 to vacate the proceedings and dismiss the complaint (J. A. 29-30); that she also applied for a stay of execution and/or other relief in Civil Action No. 111-51 on April 29, 1955 (J. A. 32-33); and that the Court below on April 29, 1955 after hearing and argument in open court on the

motion and application denied and overruled them both. Eliza T. Savage failed to appeal from this order of April 29, 1955 (J. A. 33).

Appellees filed their complaint (J. A. 34-37) on January 20, 1956, based on the judgment in Civil Action No. 111-51, in Civil Action No. 254-56 (Appeal No. 13,995 which is now moot) to set aside fraudulent deeds from Appellant John A. Savage to Appellant Eliza T. Savage (who is now deceased). On the same day William A. Gallagher, Esq., filed his appearance in Civil Action No. 111-51 for Defendant John A. Savage (J. A. 33).

On October 29, 1956, Defendant John A. Savage in Civil Action No. 111-51 filed a detailed "Motion to Strike and Vacate Judgment" of October 29, 1954 (J. A. 38-48). Judge Keech considered and overruled this motion on November 2, 1956 (J. A. 48).

The court below held a hearing on January 23, 1957 (J. A. 56) on the complaint in Civil Action No. 254-56 (which is now moot) and on appellees' several motions in Civil Action No. 111-51 to enforce the judgment of October 29, 1954 (J. A. 48-50, 51-55). This hearing resulted in the decree of the Court below dated February 11, 1957 (J. A. 56-63) from which these appeals were taken. Appellants' motion to amend this decree was overruled on March 20, 1957 (J. A. 63-64).

SUMMARY OF ARGUMENT

The order of the Court below of July 28, 1954 was no more than, and was properly, an order to enforce the order of the Auditor, as confirmed by the Court, that each side deposit expense money pursuant to Rule 15 of the Rules of the Court below. Appellant John A. Savage had consented to the reference to the Auditor and had consented to the Auditor's order for deposit of expenses. The order of July 28, 1954 was entered to enforce a rule of procedure of the Court below, and did not involve contempt or punishment. Appellant John A. Savage failed to

comply with this order and, notwithstanding, was granted a full hearing before Judge Keech which resulted in Judge Keech's judgment of October 29, 1954. Appellant John A. Savage noted an appeal from this judgment but failed to perfect the appeal and it was dismissed by this Court by mandate of April 25, 1955. Thereafter appellees executed in part on the Court's judgment. Appellant John A. Savage prevented further execution on the judgment by his fraudulent conduct in conveying joint deeds with survivorship to appellant Eliza T. Savage who is now deceased, mooting in full Appeal No. 13,995. Her death places appellant John A. Savage back in the position he was in on October 29, 1954 when Judge Keech entered his judgment. Appellant John A. Savage on October 29, 1956 moved to vacate the judgment of October 29, 1954; his motion was denied by Judge Keech on November 2, 1956, but appellant John A. Savage failed to appeal from this order.

Appellant John A. Savage is estopped by his laches from further challenging the order of July 28, 1954 and the judgment of October 29, 1954. He made free, calculated and deliberate choices in abandoning his appeal from the judgment of October 29, 1954 by failing to perfect it, and in failing to appeal from Judge Keech's denial of his motion to vacate it by order of November 2, 1956.

Appellant has had every consideration that any litigant could ever be entitled to, and appellees are now entitled to prompt relief against the gross fraud perpetrated against them, commencing in 1945, thirteen years ago. He has no standing to do anything but to submit to the judgment of October 29, 1954, as executed on by appellees.

ARGUMENT

THE ORDER OF JULY 28, 1954 IS VALID IN EVERY SENSE

On February 9, 1954 the Court below entered an order referring to the Auditor the cause of action identified as Civil Action No. 111-51

which had been pending since January 1951. Neither side objected to the reference, "which may be treated as equivalent to consent." Eichberg v. U. S. Shipping Board, etc., 51 App. D.C. 44, 273 Fed. 886, 49 W. L. R. 418 (1921). At the Auditor's first meeting of March 5, 1954 he heard the parties on the matter of requiring a deposit for expenses under Rule 15 of the Court below which provides:

> "DEPOSIT FOR EXPENSES. The Auditor or a Master may require the deposit of funds sufficient to defray the expenses of a reference, including a stenographic report of the testimony."

Appellant John A. Savage consented to, or agreed to, or at the very least acquiesced in the Auditor's order of the same day requiring each side to deposit $437.50 for expenses under Rule 15 (J. A. 3, 4, 4a, 4b). Appellant John A. Savage informed the Court below under oath on July 22, 1954 that his counsel "did not object to the auditor's ruling" (J. A. 4b, para. 4).

Appellees promptly deposited their share, or $437.50, with the Auditor on March 11, 1954 (J. A. 1). Since appellant John A. Savage failed to do so, the Auditor on June 29, 1954 filed his preliminary report with the Court below, calling attention to his failure to comply with the order. Appellees brought this preliminary report to the attention of the Court below by motion which was opposed in writing and in argument in open court by appellant John A. Savage (J. A. 4b, 4c), following which the Court (Judge Tamm) entered an order on July 28, 1954, confirming the Auditor's report and giving appellant John A. Savage five (5) days within which to comply with the Auditor's order, failing which his pleadings were stricken and judgment entered against him. The order in no manner speaks of contempt nor refers to contempt; the order purely and simply enforced a rule of procedure.

Appellant John A. Savage failed to comply with the order of July 28, 1954, although clearly able to do so. On the fifth day he handed to the Auditor's office a check in the required amount, $437.50, but

accompanied it with the condition that he would sue both Judge Tamm and the Auditor in the Municipal Court "for the recovery of the extorted money, plus punative (sic) damages " unless the money was returned to him within fifteen days (J. A. 4f). The question of whether he had complied was placed squarely before the Court below by appellees' motion of September 15, 1954 (J. A. 4d, 4e, 4f, 4g) which was opposed by appellant John A. Savage both in writing and by argument in open Court, following which the Court below set the cause down for ex parte proof before a nonjury Court and for such other and further proceedings as the nature of the case may require (J. A. 5).

This recital lays the stage for argument to sustain the validity of the order of July 28, 1954.

At the outset appellees squarely meet the doctrine of Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841 (1897), and say that this doctrine has no application to the pending appeal because the facts in Hovey v. Elliott were entirely different. Rather the law applicable to this appeal is found in National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37, 75 S. Ct. 92 (1954), which discusses and distinguishes Hovey v. Elliott, and in Societe Internationale, etc., v. Brownell, 96 U.S. App. D.C. 232, 225 F 2d 532 (1955), cert. den. 350 U.S. 937, 76 S.Ct. 302, rehrg. den. 350 U.S. 976, 76 S. Ct. 430, wherein this Court recognized that "a court has inherent power to dismiss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has failed to comply with order of the court issued pursuant to its rules."

In Hovey v. Elliott the trial court entered an order requiring the defendants to "pay over to the registry of the court" the sum of $49,297.50, which had been paid them by the receiver, Riggs & Co., a bank of this city, representing the full market value of bonds sold by the receiver to the defendants. When the defendants failed to pay the money into the registry of the court, a series of proceedings ensued

which were in name and nature contempt proceedings. These culminated in the court's striking their answer and entering a decree pro confesso against them, without hearing. The Supreme Court rendered an extensive discourse on the law of contempt from the earliest days, and struck down the trial court's decree as depriving the defendant of their property "without any hearing whatever," and therefore without due process of law, as a punishment for contempt.

In the appeal now before this Court, contempt is not involved, nor was it involved in the Court below. The only issue there and here is the inherent power of the trial court to enforce its rules. The Supreme Court has had occasion, many times since Hovey v. Elliott (1897), to consider the narrow limitations of the doctrine there announced, and has sanctioned and authorized the course taken by the Court below. Rules 37(b)(2)(iii) and 37(d), F.R.Civ.P., are excellent examples. The note of the Advisory Committee following Rule 37 states that the cited provisions of Rule 37 "are in accord with Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645 (1909), which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897), for the mere purpose of punishing for contempt."

But the Supreme Court has gone further, saying in 1954 in the National Union case, supra, in footnote 5, as follows:

> "5. The deprivation of a litigant's right to present a defense has been upheld, not as punishment for contempt as prohibited in Hovey v. Elliott, supra, but rather as a result of the litigant's failure to produce evidence, his violation of a rule of procedure, or other action justifying a judgment of default against him. (Citing cases)." (Emphasis supplied.)

This Court the following year (1955) did not hesitate to apply the philosophy of the National Union case, saying in Societe Internationale, supra, as follows:

> "We agree with Chief Judge Laws that the power to dismiss is not dependent upon the terms of Rule 37; that is to say, we think it unnecessary to find a refusal within the meaning of that Rule. As he said:
>
> '* * * apart from dismissal by authority of specific rule of court or statute, a court has inherent power to dismiss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has failed to comply with order of the court issued pursuant to its rules. * * * If this were not so, a court would be powerless to enforce its rules and a litigant might ignore them with abandon. * * *' (111 F. Supp. at page 447.)" (Emphasis supplied.)

The Supreme Court, as noted above, denied certiorari and rehearing in this case, leaving standing intact the decision of this Court.

In the case at bar, the Auditor after hearing issued an order pursuant to Local Rule 15. His order was consented to, or at the very least acquiesced in, by appellant John A. Savage. The Court below in its order of July 28, 1954 confirmed the Auditor's order, and provided a means of enforcing it, otherwise the court would have been powerless to enforce its rules and Savage could ignore them with abandon. Appellant John A. Savage was not without lawful remedy; he could have applied to this Court for leave to file a petition for writ of mandamus, or he could have brought this question before this Court by appeal in the regular manner. He did neither. (He noted an appeal, but it was dismissed when he failed to perfect it.)

What appellant John A. Savage did instead was to threaten the Court below as a condition to purported compliance with the Court's order. Was the Court below powerless to enforce its rules and litigant Savage entitled to ignore them with abandon? Particularly in light of his consent to the reference to the Auditor (by failure to object), and in light of his acquiescence in the Auditor's order as he himself admitted under oath (J. A. 4b; para. 4)? The Court below did no more than enforce its order entered pursuant to its rules, and the order of July 28, 1954 was valid in every respect.

THE JUDGMENT OF OCTOBER 29, 1954 IS VALID IN EVERY RESPECT

Judge Keech's judgment of October 29, 1954 was based on a full hearing accorded to both appellees and appellant John A. Savage. He had due and ample notice of the hearing, was present throughout, and had every opportunity to offer evidence which he did. The preamble of Judge Keech's order is very specific in this regard, stating "* * * and the plaintiffs and the defendant having each been given due and ample notice of said facts, upon consideration of the pleadings herein, the evidence offered by the plaintiffs, the evidence offered by the defendant, and after full hearing of plaintiffs and of defendant, and the defendant having had full and ample opportunity and notice to bring such witnesses as he may have desired to call and to adduce such evidence as the defendant may have desired to adduce, * * *" (J. A. 16-17).

Here again the complete inapplicability of Hovey v. Elliott is apparent. In that case there was no hearing of any kind whatever; in the case at bar appellant John A. Savage had ample notice of the hearing and participated fully therein. Judge Keech acted in the fullest sense as a chancellor in the exercise of his equity powers. He was fully and extensively advised, as his judgment of October 29, 1954 demonstrates (J. A. 16-21). There is no question whatever that appellant John A. Savage fully understood the nature and extent of the hearing as his lengthy objections to Judge Keech's proposed judgment show (J. A. 5-16). He moved for a new trial and argued the motion which was denied by Judge Keech on November 16, 1954 (J. A. 22). In due course he noted a timely appeal (No. 12, 559) from the judgment which was dismissed in April 1955 since he failed to perfect it.

APPELLANTS HAVE NO STANDING TO CONTEST ORDER OF JULY 28, 1954 AND JUDGMENT OF OCTOBER 29, 1954 IN THIS PROCEEDING

Appellant Eliza T. Savage (who is now deceased) did not have standing to contest the order of July 28, 1954 and the judgment of October 29, 1954 in this proceeding. So far as the order and judgment are concerned,

she had her day in court on April 29, 1955 when Judge Matthews denied and overruled her motion to vacate the proceedings and dismiss the complaint in Civil Action No. 111-51 (J. A. 29-30) and her application for a stay of execution and/or other relief in Civil Action No. 111-51 (J. A. 32-33). She did not appeal from this order, and would be, if alive today, debarred from contesting the order and judgment in Civil Action No. 111-51 under the ruling of this Court in Fraser v. Doing, 76 U. S. App. D. C. 111, 130 F. 2d 617, 70 W. L. R. 856 (1942). Now that she is no longer living, even the appeal as to her in Appeal No. 13, 995 is moot and should be dismissed, as pointed out earlier.

Appellant John A. Savage likewise has no standing to contest the validity of the order and the judgment in this proceeding, but for different reasons.

After the Court below entered its order of April 28, 1955 on the mandate of this Court dated April 25, 1955 (J. A. 31), the U. S. Marshal executed a writ of assistance issued by the court and in so doing placed in the possession of appellees two houses which were promptly sold by the appellees to purchasers for value (J. A. 25-28). Appellee Carmita L. Helmbold had died in the interim between the judgment of October 29, 1954 and the dismissal of the appeal on April 25, 1955, having passed away on December 2, 1954 (J. A. 50).

Many months later appellees on January 20, 1956 filed a new action, Civil Action No. 254-56, from which the moot appeal, Appeal No. 13, 995, is now pending before this Court. On October 29, 1956, appellant John A. Savage sought to strike and vacate the judgment of October 29, 1954, filing a lengthy motion for this purpose (J. A. 38-48). This was considered and overruled by Judge Keech on November 2, 1956 (J. A. 48). Appellant John A. Savage failed to appeal from this order. The final hearing held by Judge Rizley did not take place until January 23, 1957 (J. A. 56) which was long after the time for appellant John A. Savage to note an appeal from Judge Keech's order of November 2, 1956 had expired. When Judge Rizley, then, heard the several motions of appellees (J. A. 48-50, 51-55)

in Civil Action No. 111-51 to enforce the judgment of October 29, 1954, appellant John A. Savage had foreclosed himself from any further attack on the order of July 28, 1954 and the judgment of October 29, 1954 -- he had had the matter before this Court on his appeal in No. 12,559 which was dismissed in April 1955, and the following year before Judge Keech on November 2, 1956. It is no wonder that Judge Rizley in his decree of February 11, 1957 was moved to say:

> "The Court further finds that the said defendant John A. Savage had his day in Court so to speak in said Civil Action No. 111-51 and that his purported claims of unfair treatment by the Court who heard and determined said Cause No. 111-51 are without merit and substance and that the judgment so rendered by the Court on October 29, 1954, in said Cause No. 111-51 was and has been at all subsequent times valid and binding." (J.A. 61, at R. 275.)

In so saying, Judge Rizley was repeating what the record showed to be very clear.

Prior to the adoption of the Federal Rules of Civil Procedure on September 16, 1938, a litigant could attack the validity of a subsisting judgment by a bill of review, and of course the new Rules contain a similar type of remedy in Rule 60(b). But under neither the old practice could, nor under the new Rule 60(b) can, a litigant repeatedly challenge a judgment and not pursue his challenge to ultimate disposition. This was stated forcefully by the United States Supreme Court in Ackermann v. United States, 340 U.S. 193, 71 S. Ct. 209 (1950), as follows:

> "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

Appellant John A. Savage had made two separate and distinct challenges to the order of July 28, 1954 and the judgment of October 29, 1954 long prior to Judge Rizley's hearing on January 23, 1957. His challenges so made were "free, calculated, deliberate choices." This Court itself has had occasion to express the same view. In Fraser v. Doing, supra, it said emphatically:

> "There is no more reason now than in earlier years to encourage litigants, by its (Rule 56(c)) use, 'to drag out litigation endlessly, or to furnish a field for the unnecessary expenditure of money in costs and solicitors' fees.'"

In considering a bill of review filed by a litigant, this Court said further:

> "So far as the record reveals -- and it is a record made by appellant for his own purposes -- he failed to avail himself of his opportunity to challenge the jurisdiction of the trial court either in that court, or on appeal to this court."

And this Court in the footnote (no. 21) to this statement quoted language from Rothschild & Co. v. Marshall, 51 F. 2d 897, C. A. 9, 1931, which more fully from the Rothschild case is as follows:

> "To relieve against a judgment on the ground of accident or mistake, if it appears at all in a case like the one before us, it must be shown that the complaining party was without fault or negligence. A court is without power to grant relief if it appears that the party alleged to have been aggrieved could have, with proper diligence, prevented the mistake complained of. 'Laches, as well as positive fault, is a bar to such relief.' Brown v. County of Buena Vista, 95 U.S. 157, 159, 24 L. Ed. 422."

In the case at bar, if any mistake had been committed by the Court below in its order of July 28, 1954 or in its judgment of October 29, 1954, appellant John A. Savage had every opportunity to prevent a continuation of such a mistake by perfecting his appeal to this Court in No. 12, 559, or later by appealing from Judge Keech's order of November 2, 1956. But there was no mistake in either the order or the judgment, and if there were the laches of appellant John A. Savage estops him from contesting either one in this proceeding.

A motion under Rule 60(b) for relief from a judgment must be filed within a reasonable time. A reasonable time is necessarily a very short and limited period of time in circumstances such as those in this case. At every stage of the proceedings appellant John A. Savage was fully advised. He chose not to perfect his appeal in No. 12, 559, and he chose not to appeal from Judge Keech's order of November 2, 1956. Now he contends that he has standing in this proceeding to challenge the

judgment of October 29, 1954 from which he had his right of appeal which he abandoned. In other words, he says he has a right to revive his appeal in No. 12,559 by substituting the order of Judge Rizley dated February 11, 1957 for Judge Keech's judgment of October 29, 1954 because by his continued fraudulent conduct he forced appellees to obtain Judge Rizley's order of February 11, 1957 in order to be fully made whole. He is estopped by his own conduct from so contending.

This Court considered the concept of a "reasonable time" and Rule 60(b) in Gilmore v. Hinman, 89 U.S. App. D.C. 165, 191 F.2d 675, 79 W.L.R. 1172 (1951). Appellant in that case had noted but failed to perfect an appeal, which was accordingly dismissed. The following year (1950) appellant filed a motion to revoke the reference to the Auditor and set aside the judgment. The motion was denied, and appellant appealed on the ground that the trial court lacked authority to make the reference to the Auditor. This Court affirmed per curiam, holding that sixteen months was not a reasonable time and that a motion of this sort cannot be used as a substitute for an appeal. And in the case at bar, Appeal No. 13,994, the time involved is over twenty-seven months (between Judge Keech's judgment of October 29, 1954 and Judge Rizley's order of February 11, 1957).

The Fifth Circuit Court of Appeals, in a case somewhat analagous to the case at bar, rejected the appellant's contentions under Rule 60(b), holding that time is the essence of a motion for relief under this rule, Cromelin v. Markwalter, 181 F.2d 948, 14 Fed. Rules Serv. 60b.35, 1950. Appellant in June 1949 had petitioned the court to rescind all prior proceedings and orders made in the cause since he himself had initiated the bankruptcy proceeding in September 1947. The court said:

> "In the first place, they were not made in a reasonable time, and this is of the essence of a motion for relief under rule 60(b) on the ground claimed in the petitions that the orders were void. The petitions were not filed until more than a year after the sales had been made, the money paid,

> and the property delivered, though all of the proceedings now complained of had been taken with the full knowledge of appellant and, as to some of them, an appeal had been perfected and then abandoned."

Appellant John A. Savage has had the fullest consideration not only by the Court below throughout the seven years that Civil Action No. 111-51 has been dragging in litigation but also by this Court.

CONCLUSION

Appeal No. 13,995 should be dismissed as moot. The appeal in No. 13,994 should be affirmed.

Respectfully submitted,

JOHN J. DONNELLY
1028 Connecticut Avenue
Washington 6, D. C.

Attorney for appellees